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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Nuclear Waste Policy Act's provisions protecting the environment and the rights of States apply to all major federal actions by the U.S. Department of Energy to store spent nuclear fuel produced by civilian nuclear power reactors.

PARTIES BELOW

In addition to the parties named in the caption, the Shoshone-Bannock Tribes intervened on behalf of the State of Idaho. Public Service Company of Colorado intervened on behalf of the U.S. Department of Energy.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The State of Idaho petitions this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order and amended opinion of the Court of Appeals is reported at 945 F.2d 295 (9th Cir. 1991). It is reprinted in the Appendix ("App."), at 1 to 11.

JURISDICTION

On February 7, 1991, the State of Idaho filed a petition invoking the Court of Appeals' original jurisdiction under the Nuclear Waste Policy Act, 42 U.S.C. § 10139. The Court of Appeals' judgment dismissing the petition was entered on September 20, 1991. A timely petition for rehearing was denied on December 13, 1991 (App. at 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Nuclear Waste Policy Act are reproduced in the Appendix (App. at 12 to 244).

STATEMENT

This case arises from the Department of Energy's failure to comply with the Nuclear Waste Policy Act, enacted in 1982 and amended in 1987. 42 U.S.C. § 10101 *et seq.* The statute sets out a "comprehensive scheme for the disposal of SNF [spent nuclear fuel] and other high-level radioactive waste generated by civilian power reactors." *General Elec. Uranium v. Dep't of Energy*, 764 F.2d 896, 898 (D.C. Cir. 1985).

Enacted to "grapple with the multitude of problems associated with the generation of nuclear waste by

commercial power facilities,"[1] interim and permanent solutions are set out in the Nuclear Waste Policy Act. On the latter front, the statute requires the Department of Energy to construct a "deep geological disposal" facility or "repository" to permanently store this nation's commercially produced spent nuclear fuel and other high-level radioactive waste. 42 U.S.C. §§ 10101 to 10145.

In the interim, though, the Nuclear Waste Policy Act provides that "the persons owning or operating civilian nuclear reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors[.]" 42 U.S.C. § 10151(a)(1). Private utilities are to do so "by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical[.]" *Id.*

As a stop gap measure, if persons operating or owning civilian nuclear reactors "cannot reasonably provide adequate storage capacity at the sites of such reactors when needed to assure the continued, orderly operation of such reactors," the Nuclear Waste Policy Act imposes upon "the Federal Government . . . the responsibility to provide . . . 1,900 metric tons of capacity for interim storage of spent nuclear fuel[.]" 42 U.S.C. § 10151(a)(3); *see also*, 42 U.S.C. § 10155(a)(1). But several caveats apply to this grant of authority – conditions that protect the quality of the environment and the rights of the States.

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[1] *State of Tennessee v. Herrington*, 626 F. Supp. 1345, 1346 (M.D. Tenn.), *reversed on other grounds*, 806 F.2d 642 (6th Cir. 1986).

If the Department of Energy proposes to store 300 or more metric tons of spent nuclear fuel at any one Federal site, the Nuclear Waste Policy Act mandates that the agency must first prepare an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332[2][C]). 42 U.S.C. § 10155(c)(1). Upon completing that study, if the Department of Energy decides to go forward with the proposal, the statute requires the agency to notify the Governor and Legislature of the State where the site is located. 42 U.S.C. § 10155(d)(6)(A). In turn, the Nuclear Waste Policy Act allows the Governor or Legislature to submit a notice of disapproval of that action with Congress, and further provides that the disapproval shall be effective unless overturned within ninety days by a joint resolution of Congress. 42 U.S.C. §§ 10155(d)(6)(A)-(D).

In addition, the Nuclear Waste Policy Act ensures that the federal government's storage of civilian spent nuclear fuel on an interim basis is a remedy of last resort. The Department of Energy's authority to enter into interim storage contracts with private utilities from 1983 through the end of 1989 (42 U.S.C. §§ 10155[b] and 10156[a][1]), is conditioned upon the Nuclear Regulatory Commission first determining that "adequate storage capacity to ensure the continued orderly operation of the civilian nuclear power reactor at which such spent nuclear fuel is generated cannot be provided by the person owning or operating such reactor . . . and such capacity cannot be made available in a timely manner[.]" 42 U.S.C. § 10155(b)(1)(A).

Despite these requirements, the Department of Energy in February of 1991 decided to store an aggregate

of 300 metric tons of civilian spent nuclear fuel at the Idaho National Engineering Laboratory's Irradiated Fuel Storage Facility. The decision was made in furtherance of a 1965 contract entered into with Public Service Company of Colorado ("Public Service"), as modified in 1980 and revived in 1988. App. at 255 to 302.

Under the 1965 contract, as modified in 1980, the Department of Energy agreed to take title to eight segments of spent nuclear fuel produced at the Public Service's Fort St. Vrain Nuclear Generating Station in Colorado. *State of Idaho v. U.S. Dep't of Energy*, 945 F.2d 295, 296 (9th Cir. 1991). The first three segments were delivered to the Department of Energy's Idaho National Engineering Laboratory in 1980, 1982 and 1984-1986, where they remain stored today. *Id.* The original contract, as modified, expired on January 1, 1987. *Id.* at 297.

Fifteen months later, on May 11, 1988, the Department of Energy and Public Service agreed to revive the earlier contract, stating that the earlier "contract shall continue in effect until the company has delivered eight fuel segments which is currently estimated to be by December 31, 1997." *Id.* Inexplicably, though, the Department of Energy entered into this agreement without the benefit of any finding from the Nuclear Regulatory Commission that Public Service was incapable of storing the spent nuclear fuel produced at its Fort St. Vrain Nuclear Generating Station in Colorado. *Id.*

In February of 1991, the Department of Energy decided to accept delivery of the remaining five segments of Fort St. Vrain spent nuclear fuel and store it at the Idaho National Engineering Laboratory's Irradiated Fuel

Storage Facility. *Id.* The decision was unaccompanied by the preparation of an environmental impact statement (*id.*), even though the Department of Energy had conceded one year earlier that under its agreement with Public Service an aggregate of 300 metric tons of Fort St. Vrain spent nuclear fuel would be stored in the Idaho National Engineering Laboratory's Irradiated Fuel Storage Facility. App. at 254.

After being notified of that decision, the Governor of the State of Idaho submitted a petition of disapproval with both Houses of Congress. App. at 303 to 305. It has not been overturned by any resolution or Act of Congress.

The State of Idaho also filed a petition for judicial review with the Court of Appeals for the Ninth Circuit.[2] Citing to the Ninth Circuit's own precedent that this nation's environmental laws apply to major federal actions undertaken pursuant to preexisting obligations, Idaho argued that the presence of the contract with Public Service did not immunize the Department of Energy from the requirements of the Nuclear Waste Policy Act.[3]

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[2] The Nuclear Waste Policy Act provides that "the United States Courts of Appeals shall have original . . . jurisdiction over any civil action alleging the failure of the Secretary [of the Department of Energy] . . . to make any decision, or take any action, required under this part." 42 U.S.C. § 10139(a)(1)(B).

[3] The Department of Energy countered that the Nuclear Waste Policy Act did not apply to this case because Public Service's Fort St. Vrain Nuclear Generating Station was experimental as opposed to a civilian power reactor. It also countered that the statute only applied to the storage of light

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Without discussing or acknowledging this precedent, the Ninth Circuit declared that the Nuclear Waste Policy Act does not apply to the storage of 300 or more metric tons of spent nuclear fuel in this case because the action was originally authorized under a contract that pre-dates the statute. *State of Idaho v. U.S. Dep't of Energy*, 945 F.2d 295 at 298-99 (9th Cir. 1991). The Court reached this result by holding that the statute's provisions concerning the storage of 300 or more metric tons of spent nuclear fuel at any one site only apply to interim storage contracts entered into between January 7, 1983 and January 1, 1990. *Id.* at 299. The holding is an anomaly, for the statute itself does not contain any words that so restrict its reach.[4] *See* discussions, *infra*, at 12 to 20.

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water reactor fuel rather than the high-temperature gas reactor fuel produced by the Fort St. Vrain Nuclear Generating Station.

The Ninth Circuit did not accept the attempted distinctions, and for good reason. *See State of Idaho v. U.S. Dep't of Energy*, 945 F.2d 295 (9th Cir. 1991). The Nuclear Waste Policy Act's ambit extends to spent nuclear fuel produced by any "civilian nuclear powerplant required to be licensed under section 103 or 104b of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2133 and 2134b)." 42 U.S.C. § 10101(6). The Fort St. Vrain Nuclear Generating Station was licensed under section 104b of the Atomic Energy Act of 1954. In addition, the statute carves out no exception for different types of spent nuclear fuel. 42 U.S.C. § 10101(23) (spent nuclear fuel defined without exception as "fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing").

[4] Lastly, in only a few words, the Ninth Circuit dismissed the State of Idaho's position that the 1988 agreement entered

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REASONS FOR GRANTING THE WRIT

A. THE QUESTION PRESENTED IS OF RECURRING IMPORTANCE

The question presented – whether the Department of Energy may now undertake major federal actions to store spent nuclear fuel outside the terms specified by the Nuclear Waste Policy Act – is of recurring importance. The question arises because the Ninth Circuit's decision, by holding that the relevant parts of the statute only apply to major federal actions authorized by contracts entered into between 1983 through 1989, effectively eviscerates the requirements that the Department of Energy prepare an environmental impact statement, and obtain the concurrence of the affected State, before storing civilian spent nuclear fuel on an interim basis.

This Court already has noted that by the year 2000 over 72,000 metric tons of commercial spent fuel will have accumulated. *Pacific Gas & Electric Company v. State Energy Resources Conserv.*, 461 U.S. 190, 195 (1983). The Department of Energy itself has estimated that by 1998

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into between Public Service and the Department of Energy was subject to the requirements of the Nuclear Waste Policy Act. *State of Idaho v. U.S. Dep't of Energy*, 945 F.2d at 299. The Court avoided the applicability of the statute to that undertaking by resorting to labels – it characterized the 1988 agreement as no more than a "modification [that] merely clarified the parties' pre-existing obligations and did not constitute a separate contractual agreement." *Id.* What is left unexplained, though, is that the original contract expired on January 1, 1987 and, as such, the May 1988 agreement represented a new undertaking by the Department of Energy.

over sixty nuclear reactors will need interim storage capacity beyond what is available on-site. *Managing the Nation's Commercial High-Level Radioactive Waste*, Appendix B at 258 (Office of Technology Assessment OTA-0-171, March 1985.) Thus far, private utilities have not taken the necessary steps to do so. *Id.*[5]

Moreover, the day when the Department of Energy will have built a facility to permanently store spent nuclear fuel and high-level radioactive waste is ever-receding. A permanent repository will not be open until 2010, at the earliest. *See Commonwealth Edison v. Allied-General Nuclear Services*, 731 F. Supp. 850 (N.D. Ill. 1990). As the concerns over how to store spent nuclear fuel in the interim mount, the Department of Energy will be under increasing pressure to resolve the problem for private utilities. Thus, the question tendered – whether the

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[5] As Edward M. Davis, President of the American Nuclear Energy Council, recently testified to the Subcommittee on Energy and Environment of the House Committee on Interior and Insular Affairs:

> [T]he National Association of Regulatory Commissioners published a study on July 20, 1991, showing that by 2010 – the year that DOE projects for opening a permanent repository – 66 of the 83 spent fuel storage pools at U.S. reactors will have reached existing storage capacity.
>
> * * *
>
> [I]t is unlikely that . . . by 1998 . . . that utilities [will] have the capability to build on-site storage . . . On-site storage is not a solution to the high-level waste disposal issue.

Prepared Testimony of Edward M. Davis, at 7 and 8 (January 10, 1992).

Nuclear Waste Policy Act's provisions governing major federal actions to store spent nuclear fuel on an interim basis are a dead letter – is at a critical juncture.

By rendering the statutory provisions at issue here a dead letter, rather than tying them to future storage activity, the Court of Appeals also has paved the way for the Department of Energy to accommodate private utilities in the future without regard to otherwise valid commands from Congress. Idaho asks this Court to intervene so that effect is given to the regulatory course chosen by Congress.

In this context, significant practical consequences exist for the States and the public if the Department of Energy is allowed to engage in future storage activity outside of the protective scheme prescribed by the Nuclear Waste Policy Act. As this Court has previously noted, spent fuel is radioactive for thousands of years and if not properly stored, it will "leak and endanger both the environment and human health[.]" *Energy Resources,* 461 U.S. at 196. No method, moreover, exists for storing spent fuel "that is proof against contamination of the soil or water in which it is stored." *Commonwealth Edison,* 731 F. Supp. at 852.[6]

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[6] An assistant to the director of EPA's Hazardous Site Control Division has recently noted:

> [W]hile the latest "state-of-the-art" nuclear dump is leaking in France, half of the nuclear dumps in the U.S. remain closed and leaking – with no significant cleanup yet accomplished – 16 years after the first, failed dump closed. A recent investigation of the

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The State of Idaho's concerns, in this regard, are more than of academic interest. The Idaho National Engineering Laboratory is a Superfund site. It rests over the Snake River Aquifer, the primary source of Idaho's drinking water, and radioactive contaminants have already been measured in the groundwater below its surface. Allowing the Department of Energy to store spent nuclear fuel at that site in derogation of the Nuclear Waste Policy Act's protections directly implicates the very interests to be protected by the statute; namely, the quality of the environment and human health.

Neither should the contours of this controversy await further refinement in the appellate courts. Both the Sixth and the D.C. Circuits have stressed the need to timely resolve disputes over the federal government's responsibilities under the Nuclear Waste Policy Act. Indeed, the statute's grant of original jurisdiction to the courts of appeals exists to "promote the congressional goals of efficiency and predictability" in dealing with the pressing national concern about the safe disposal of nuclear waste. *General Elec. Uranium v. Dep't of Energy*, 764 F.2d 896, 904 (D.C. Cir. 1985); *see also, State of Tennessee v. Herrington,*

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federal government's nuclear weapons complex, by the congressional Office of Technology Assessment (OTA), found that groundwater at every Department of Energy (DOE) weapons site is contaminated, and that the DOE's assertion that contamination poses no imminent health risks "is not substantiated by scientific evidence."

H. Kaufman and L. Moorer, *The Nuke Dump NIMBY Game*, 128 Public Utility Fortnightly No. 2 at 16 (1991).

806 F.2d 642, 649 (6th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

The Ninth Circuit's decision, accordingly, warrants immediate review by this Court. This is especially so given the holding vitiates an entire part of the Nuclear Waste Policy Act.

B. THE DECISION BELOW IS PLAINLY ERRONEOUS

With the passage of the Nuclear Waste Policy Act, Congress for the first time established in law a comprehensive federal policy for managing, storing and disposing commercially produced high-level radioactive waste. The D.C. Circuit has noted that the statute is a "comprehensive scheme for the disposal of SNF [spent nuclear fuel] and other high-level radioactive waste generated by civilian power reactors." *General Elec. Uranium v. U.S. Dep't of Energy*, 764 F.2d 896, 898 (D.C. Cir. 1985).

Despite the statute's comprehensive scope and broad purpose, the Ninth Circuit's decision carves out an exception for major federal actions involving the storage of spent nuclear fuel that were authorized prior to the enactment. That result, however, cannot be squared with principles announced long ago by this Court. Namely:

> [F]ederal regulation of future action based upon rights previously acquired by the person is not prohibited.
>
> * * *
>
> Immunity from Federal regulation is not gained through forehanded contracts.

Fleming v. Rhodes, 331 U.S. 100, 107 (1947).[7] This principle is especially apposite in areas of public health and safety, where it has always been held that the government cannot bargain its police powers away, and further undermines the Ninth Circuit's decision. *See, e.g., Home Building & Loan Asso. v. Blaisdell*, 290 U.S. 398, 436 (1934).

The Court of Appeal's holding also ignores its own well established precedent that current environmental laws must apply to further major federal actions, even if those actions were authorized prior to the law's enactment. For more than two decades, the Ninth Circuit has applied the National Environmental Policy Act to all further major federal actions, including those actions based on contracts that pre-date the statute's enactment. *See Port of Astoria, Oregon v. Hodel*, 595 F.2d 467 (9th Cir. 1979); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973). For example, in *Port of Astoria*, the Ninth Circuit applied the National Environmental Policy Act to a project pre-dating the statute, stating:

> This circuit has held that an EIS is required to assess a major federal project initiated before the effective date of NEPA when the project entails a further major action that would occur after NEPA's effective date[.]

Id. at 477 (emphasis added).

Although the National Environmental Policy Act ("NEPA") contains no express language indicating

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[7] *See also, Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 279 (1969); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 903 (9th Cir. 1979).

whether it should apply to projects pre-dating its inception, a number of reasons exist why the courts have routinely applied it to such projects when they involve further action. NEPA seeks to protect the environment from abuses by federal agencies, and this goal can be best fulfilled if ongoing major federal actions are subject to the Act's provisions. *See Lee v. Resor*, 348 F. Supp. 389 (M.D. Fla. 1972). Also weighing in favor of this result is that our understanding of environmental risks is ever-changing. *See U.S. v. 247.37 Acres*, 3 ERC 1098 (S.D. Ohio 1971). Fluid application of environmental laws is essential if public health and safety is to be protected. Finally, and perhaps most importantly, the courts have been keenly aware of the broad sweep of NEPA's terms and the clear congressional policy of affording the public as much protection as practical. *Id.; see also, Monroe County Conservation Council Inc. v. Volpe*, 472 F.2d 693, 698-99 (2nd Cir. 1972); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1330-35 (4th Cir. 1972); *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1129 (D.C. Cir. 1971).

The Nuclear Waste Policy Act, likewise, is directed at affording the public broad health and safety protections against potentially dangerous federal actions. Indeed, not only are the underlying policies behind the Nuclear Waste Policy Act substantially similar to those behind NEPA, it specifically incorporates the requirements of NEPA. As noted before, Congress has determined that if 300 or more metric tons of spent fuel are temporarily

stored at a federal facility, an environmental impact statement must be prepared. 42 U.S.C. § 10155(c).[8]

Despite these convergencies, the Ninth Circuit disregarded the applicability of its precedent in *Port of Astoria*. It instead appeared particularly concerned that the Nuclear Waste Policy Act does not "expressly address the Act's applicability to pre-existing storage agreements." *State of Idaho v. U.S. Dep't of Energy*, 945 F.2d at 298.

However, NEPA also does not state whether it applies to pre-existing contracts. Neither has this silence prevented the Ninth Circuit and other jurisdictions from applying its protections to further federal action in order to safeguard the public. Nor is any cogent reason evident

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[8] Congress has already defined a "major federal action" stating: "the provision of 300 or more metric tons of storage capacity at one federal site . . . shall be considered to be a major federal action requiring preparation of an environmental impact statement." 42 U.S.C. § 10155(c)(1). Thus, by definition, performance of Department of Energy's purported contract obligation to store 300 tons of Fort St. Vrain spent nuclear fuel at the Idaho National Engineering Laboratory is a "further" major federal action. Moreover, congressional dictates aside, the Department of Energy's duties under the contract are performed in segments, with two-thirds of the contract yet to be performed. Those casks of fuel which have arrived in Idaho were primarily shipped in the early 1980s. For almost half a decade, no shipments have occurred. Now, after years of inactivity, the Department of Energy plans to ship and store hundreds of tons of additional Fort St. Vrain fuel. The 1991 decision to fully perform the purported contract obligation is a further major federal action under both the facts of this case and congressional dictates.

to more restrictively apply the NEPA precautions implemented through the Nuclear Waste Policy Act. To the contrary, given the considerable scientific, political and public concern surrounding nuclear waste, those NEPA protections specifically tailored to the nuclear context and implemented through the Nuclear Waste Policy Act should be given at least as broad an application as is traditionally the case under NEPA.

The Nuclear Waste Policy Act's provisions requiring the Department of Energy to prepare an environmental impact statement and obtain the affected State's concurrence before undertaking major federal action to store civilian spent nuclear fuel also are not as circumscribed as suggested by the Ninth Circuit. The requirement to prepare an impact statement, in the words of the statute, applies to "[t]he provision of 300 or more metric tons of storage capacity at any one Federal site under subsection (a)(1)(A) of this section[.]" 42 U.S.C. § 10155(c)(1). The duty to obtain the affected State's concurrence likewise applies when the Department of Energy "decid[es] to provide an aggregate of 300 or more metric tons of storage capacity under subsection (a)(1)(A) of this section[.]" 42 U.S.C. § 10155(d)(6)(A). The referenced subsection, in turn, merely authorizes the Department of Energy to provide up to 1900 metric tons of capacity for the storage of spent nuclear fuel. 42 U.S.C. § 10155(a)(1). The words of the statute simply do not limit the Department of Energy's duties to prepare environmental impact statements or obtain the concurrence of affected States to just major federal actions authorized under contracts entered into between 1983 through 1989.

The Ninth Circuit, instead, had to infer that limitation. *State of Idaho v. U.S. Dep't of Energy*, 945 F.2d at 298-99. But it does not follow, for the inference defeats the statute itself.

When Congress enacted the Nuclear Waste Policy Act, it wanted private utilities to take care of their own temporary storage needs and not impose this burden on the public. For this reason, the Act states that utilities must provide their own onsite storage whenever "practical." 42 U.S.C. § 10151(a)(1).

The statute's seven-year limit on the Department of Energy's authority to accommodate utilities also was enacted for a purpose far different than described by the Ninth Circuit. 42 U.S.C. § 10156(a)(1). The House Report on the Nuclear Waste Policy Act states:

> No utility will be eligible for use of Federal interim storage capacity for spent fuel unless it can show both that it can not [sic] provide its own capacity in a timely manner, and that it is diligently pursuing alternatives to use of Federal capacity. The Committee anticipates that all utilities can provide increase [sic] storage capacity in a timely, safe, and economical manner *over the next eight years*. Although there may be a near-term need for use of Federal capacity, the Committee has recommended programs under which it anticipates all utilities will be able to resolve their storage problems by the end of the decade.

H.R. Rep. No. 491, 97th Cong., 2d Sess. pt. 1, p. 38 (1982) (emphasis added).

Thus, contrary to the Ninth Circuit's interpretation, the seven-year "window" is an expression of Congress' determination that utilities must move rapidly toward the development of their own at-reactor spent fuel storage facilities. It is not merely a limited time period, outside of which the Department of Energy may engage in largely unregulated interim storage activity.

The Court of Appeal's added assertion that the Nuclear Waste Policy Act is not comprehensive because Congress already believed the Department of Energy was providing interim storage services to commercial utilities is equally unsupportable. *State of Idaho v. U.S. Dep't of Energy*, 945 F.2d at 298-99. The legislative history indicates the exact opposite – that when the Nuclear Waste Policy Act was enacted, Congress believed the Department of Energy had already once been denied interim storage authority. The following excerpts from the debate on the legislation are illuminating:

> In October 1977, the Department of Energy (DOE) announced its plans to accept and take title to the spent fuel accumulating at reactor sites. Congressional authorization for that Federal AFR program was sought by DOE during the Carter administration but never obtained[.]
>
> * * *
>
> On April 7, 1977, President Carter declared a moratorium on the commercial reprocessing of spent nuclear fuel from U.S. powerplants as part of his nuclear nonproliferation policy. Following on Carter's April 27 announcement the U.S. Department of Energy proposed in October 1977 that the Federal Government accept and take title to utility spent fuel accumulating at reactor

> sites and provide temporary storage space for the fuel at federally operated away-from-reactor (AFR) storage sites. Congress however never authorized DOE to proceed with a Federal AFR storage program.

128 Cong. Rec. S8224 (1982) (statement of Senator Thurmond); 128 Cong. Rec. S8230 (1982) (statement of Senator Moynihan).

Certainly, there was always some storage space available at federal facilities. But this storage was built to further the Department of Energy's defense or research programs. It was not created to place the federal government in the interim storage business for commercial utilities. *See, e.g., Commonwealth Edison v. Allied General Nuclear Services,* 731 F. Supp. 850, 856 (N.D. Ill. 1990) (Judge Posner distinguishing storage incidental to reprocessing from interim storage services).[9]

At bottom, wrenching the provisions at issue here from the Nuclear Waste Policy Act creates an anomalous situation whereby the Department of Energy can sidestep congressional policy and restrictions. To accept this result, one must conclude that when Congress enacted the statute, it intended to restrict federal interim storage for only seven years and then give the Department of Energy free reign in its interim storage decisions.

Such a construction of the provisions at issue is not reasonable. They are clearly part of Congress' ongoing

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[9] Interestingly, at one time the Department of Energy planned to reprocess the Fort St. Vrain spent nuclear fuel and prepared limited storage space to further this research program. That research project was, however, shelved by 1979.

plan to provide heightened protections for the public and environment in regard to all major federal actions involving the storage of civilian spent nuclear fuel. Given the completeness of the provisions, the statute admits of no exceptions; if interim storage is being proposed, the statute applies. The Ninth Circuit's refusal to apply the statute's protections to major federal actions that remain to be undertaken violates its own precedent on the application of environmental laws, vitiates the statute itself, and does harm to states like Idaho that have relied upon the balance struck in the Nuclear Waste Policy Act.[10]

CONCLUSION

When solutions to environmental abuse are enacted, their implementation should not be foreclosed because of prophetic forehanded contracts bargaining away congressional protection. If such is the case, it will not be past, but continuing federal abuses of the environment for

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[10] But even if the Ninth Circuit were correct in its reading of the statute, the original contract authorizing the Department of Energy to take title to and store the Fort St. Vrain spent nuclear fuel expired by its own terms in January of 1987, years after the Nuclear Waste Policy Act's enactment, and had to be "extended" in May of 1988 by a separate document so it could be performed. It is axiomatic that when a contract is extended or modified, current law applies to its new terms. Current legal restrictions cannot be avoided simply by reviving agreements that pre-dated those restrictions. Thus, even under the Ninth Circuit's theory as to the statute's reach, the Department of Energy's obligation to store the spent nuclear fuel arose during the time of and is subject to the requirements of the Nuclear Waste Policy Act.

which we must pay. The Ninth Circuit decision invites this result. For the reasons stated in this petition, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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March 1992

APPENDIX A

STATE OF IDAHO, Petitioner,

Shoshone-Bannock Tribes, Intervenors,

v.

U.S. DEPARTMENT OF ENERGY, Respondent,

Public Service Company of Colorado, Intervenor.

No. 91-70094.

United States Court of Appeals, Ninth Circuit

Argued and Submitted Sept. 10, 1991.

Decided Sept. 20, 1991.

As Amended on Denial of Rehearing and Rehearing En Banc Dec. 13, 1991.

On Petition from Orders of the United States Department of Energy.

Before WRIGHT, FARRIS and TROTT, Circuit Judges.

Clive J. Strong, Deputy Atty. Gen., Natural Resources Division, Boise, Idaho, for petitioner.

David C. Shilton, Appellate Section, Environmental and Natural Resources Div. U.S. Dept. of Justice, Washington, D.C., for respondent.

Jeanette Wolfley, Tribal Attys. Office, Fort Hall, Idaho, for intervenor-petitioner.

David W. Kerber, Kelly, Stansfield and O'Donnell, Denver, Colo., for intervenor-respondent.

FARRIS, Circuit Judge:

The State of Idaho petitions for review of the Department of Energy's decision to transport into Idaho for storage spent nuclear fuel produced at the Fort St. Vrain nuclear power station in Colorado. Shoshone-Bannock Indian Tribes intervene on behalf of Idaho and argue that transportation of radioactive material violates various governmental obligation to the Indians. Public Service Company, the owner of the Fort St. Vrain plant, intervenes on behalf of DOE. We dismiss the petition for lack of jurisdiction.

I. Background

In 1965, the Atomic Energy Commission entered into a contract with the Public Service Company of Colorado to construct an experimental nuclear generator. Unlike conventional reactors which use low uranium fuel and a water process for cooling, the contracted High Temperature Gas-Cooled Reactor required a special enriched uranium fuel and used "dry" helium gas cooling, a technology believed to be more safe and clean. In allocating the responsibilities for the project, the government agreed to "[p]urchase . . . fuel elements discharged" from the reactor and "[r]eprocess" the elements if funds were appropriated for a reprocessing facility.

Pursuant to the contract, Public Service constructed the Fort St. Vrain Nuclear Power Plant. The Fort St. Vrain reactor was the first Untied States power reactor to store

spent fuel dry instead of under water. The reactor was accepted for commercial operation as of January 1, 1979. In 1975, the government, in anticipation of its responsibility for the spent fuel, constructed the Irradiated Fuels Storage Facility at Id-ho National Engineering Laboratory. An uncontested Environmental Impact Statement was completed in 1977 concerning waste management operations at the Idaho National Engineering Laboratory, including storage in the Irradiated Fuels Storage Facility.

In order to implement the terms of the 1965 contract, DOE (which had replaced the Atomic Energy Commission) entered into an agreement with Public Service on April 1, 1980, modifying the contract to specify the conditions for transfer of the spent fuel. Under the 1980 modification, the government agreed, pursuant to its obligations under the original contract, to purchase eight "nuclear fuel segments discharged from the Plant" for $5.4 million, upon delivery to the Idaho facility. Public Service delivered the first segment of spent fuel to the Idaho facility in 1980. Two additional segments were shipped in 1982 and from 1984-1986, without incident.

Because the Fort St. Vrain plant was operating at a restricted rate, it became clear that all eight of the contracted fuel segments would not be delivered prior to January 1, 1987 – the term set by the original contract. In a 1983 memorandum, the Chief Counsel to DOE indicated that he believed the 1980 modification evinced "a commitment by the parties to specify the amount of fuel as eight segments rather than to base the amount of fuel to be delivered upon a particular time." Consequently, he interpreted the contract, as modified by the 1980 agreement, to obligate DOE to receive eight segments of Fort

St. Vrain spent fuel regardless of the time of delivery. In November of 1987, Public Service sent a letter to DOE stating that they understood the contract, as modified, to require DOE to accept eight segments of fuel regardless of the date of delivery and indicating that they would demand an extension if DOE considered the contract expired as of January 1, 1987. On May 11, 1988, DOE and Public Service agreed to an additional modification to the contract stating that the "contract shall continue in effect until the company has delivered eight fuel segments which is currently estimated to be by December 31, 1997."

In August of 1989, Public Service decided to shut down the Fort St. Vrain reactor because the plant was no longer commercially operable. Public Service notified DOE that it planned to deliver the remaining five fuel segments under the contract and a sixth segment if DOE was willing. Governor Andrus of Idaho, apprised of the proposed delivery, communicated in a letter to the manager of the DOE Idaho Operations Office that Idaho was no longer willing to receive radioactive waste from another state.

DOE prepared an environmental assessment pursuant to the National Environmental Policy Act to determine the impact of transporting and storing this radioactive material. The environmental assessment concluded that there would be no significant environmental impact, and, on February 5, 1991, the DOE issued a formal Finding of No Significant Impact. On February 6, Governor Andrus sent a letter to Public Service stating that the Fort St. Vrain spent fuel would "not be permitted in the State of Idaho," and that the State was "prepared to take all appropriate steps to prevent these shipments

from entering the State of Idaho." DOE notified Governor Andrus on February 7, 1991, that it intended to receive the spent fuel. The next day Idaho filed this petition.

II. Discussion

Idaho does not allege that it has authority to preclude the transfer of spent fuel from Colorado to the federal facility in Idaho. Rather, it argues that the transportation and storage of the nuclear material violates various requirements of the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270, and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370b.

The procedural posture of this action differs from typical petitions for review of administrative action. This petition was not preceded by any formal administrative or judicial proceeding. There is no formal agency order, opinion, or findings of fact or law for review.

Idaho asserts original jurisdiction in this court pursuant to the Nuclear Waste Policy Act, 42 U.S.C. § 10139. All claims other than those brought pursuant to the Nuclear Waste Policy Act are based on pendent jurisdiction. Shoshone-Bannock Indian Tribes also assert original and pendent jurisdiction pursuant to the Nuclear Waste Policy Act.

DOE does not contend that the decision to store the Fort St. Vrain material comported with various requirements of the Nuclear Waste Policy Act. Rather, DOE argues that: (1) the Act is inapplicable to storage agreements reached prior to the statute's enactment and (2) the current storage decision fulfills the government's pre-

existing obligation under the original 1965 contract as clarified by the subsequent modification agreements. Idaho argues that: (1) the Nuclear Waste Policy Act is comprehensive legislation governing all federal storage of civilian nuclear waste; (2) DOE had no authority to enter agreements for storage of nuclear waste prior to enactment of the Act; and (3) the 1988 modification extending the term for delivery of the radioactive waste was an agreement for interim storage subject to the Act.

In determining the applicability of the Nuclear Waste Policy Act to pre-existing storage agreements, we first look to the plain language of the statute. Subchapter I, Part B, of the Act governs interim storage. Section 10155 states:

> (a)(1) [DOE] shall provide, in accordance with paragraph (5), not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel from civilian power reactors. . . .
>
> * * *
>
> (5) [DOE] shall ensure that storage capacity is made available under paragraph (1) when needed, as determined on the basis of the storage needs specified in contracts entered into under section 10156(a) of this title, and shall accept upon request any spent nuclear fuel as covered under such contracts. . . .
>
> * * *
>
> (b)(1) Subject to the capacity limitation established in subsections (a)(1) and (d) of this section, [DOE] shall offer to enter into, and may enter into, contracts under section 10156(a) of this title with any person generating or owning

> spent nuclear fuel for purposes of providing storage capacity for such spent fuel under this section only if the Commission determines that –
>
> (A) adequate storage capacity to ensure the continued orderly operation of the civilian nuclear power reactor at which such spent nuclear fuel is generated cannot reasonably be provided by the person owning and operating such reactor at such site. . . .

Section 10156(a) provides:

> During the period following January 7, 1983, but not later than January 1, 1990, [DOE] is authorized to enter into contracts with persons who generate or own spent nuclear fuel resulting from civilian nuclear storage activities for the storage of such spent nuclear fuel in a [federal] storage capacity provided under this part: *Provided, however,* That [DOE] shall not enter into contracts for spent nuclear amounts in excess of the available storage capacity specified in section 10155(a) of this title.

The statute does not expressly address the Act's applicability to pre-existing storage agreements. Read in light of the statute's historical context and the accompanying legislative history, however, the language and structure of the Act indicate that it does not apply to storage agreements in existence before its enactment.

Prior to the late 1970's, private utilities operating nuclear reactors were largely unconcerned with the storage of spent nuclear fuel. It was accepted that spent fuel would be reprocessed. Utilities entered contractual agreements for their spent fuel with private reprocessors.

H.R.Rep. No. 491, 97th Cong., 2nd Sess., pt. 1, p. 27, U.S. Code Cong. & Admin.News 1982, pp. 3792, 3793. In the mid-70's, however, the private reprocessing industry collapsed for both economic and regulatory reasons. *Id.* As a consequence, the nuclear industry was confronted with an unanticipated accumulation of spent nuclear fuel, inadequate private facilities for the storage of the spent fuel, and no long term plans for managing the nuclear waste. *Id.*

Because of the dangers of this unanticipated nuclear waste accumulation, Congress enacted the Nuclear Waste Policy Act. The Act was directed toward both the immediate and long term problems associated with storage of nuclear waste. Congress settled on a long-term policy of permanent storage. *Id.* at p. 29. Because the construction of permanent nuclear waste repositories would take years and the nuclear waste bottleneck caused by the collapse of the reprocessing industry threatened the continued operation of many reactors, Congress authorized DOE to contract with private utilities for interim storage at existing federal facilities. *Id.* at p. 37.

Understood in terms of its history, the interim storage provisions of the Nuclear Waste Policy Act are not comprehensive regulations governing all federal storage of nuclear waste, but remedial legislation addressed to a specific problem. Congress recognized that federal facilities could provide interim storage for a limited quantity of the spent fuel left unaccounted for by the collapse of the reprocessing industry. The Act specifies that DOE, during the period from January 7, 1983, to January 1, 1990, provide for the storage of up to 1900 tons of private spent fuel not otherwise accounted for, and for which

storage was necessary to ensure a reactor's continued operations. To ensure that this storage was undertaken in a safe and orderly fashion, the Act imposes a number of requirements. These requirements do not, however, apply to all federal storage of spent nuclear fuel. Each of the Act's various requirements concerning interim storage are specifically limited to contracts entered into pursuant to section 10155(a)(1)(A). Congress was aware that the government had other obligations for the storage of spent nuclear fuel. H.R.Rep. No. 491, 97th Cong., 2nd Sess., pt. 1, 37. The government's pre-existing storage of spent nuclear fuel was the reason federal facilities were available to remedy the nuclear waste problem. The Act's restrictive language limits the requirements to the specific set of remedial storage agreements authorized by the Act itself. Spent nuclear fuel accounted for by pre-existing agreement was not part of the pool of radioactive material for which there was no available storage and for which interim storage was necessary to ensure continued operations. Such pre-existing agreements were not entered into under the auspices of section 10155 of the Nuclear Waste Policy Act, nor was this accounted for spent fuel the subject of the Act. *Id.* at pp. 37-38. The Nuclear Waste Policy Act does not apply to federal interim storage agreements in existence before its enactment.

Idaho argues that the Nuclear Waste Policy Act must apply to the interim storage of Fort St. Vrain spent nuclear fuel because DOE had no authority to provide interim storage independent of the Act. The original statute authorizing the Fort St. Vrain project provided that the government was "authorized . . . to purchase . . . the

isotope 233 produced in and discharged from the reactor." Public Law 89-32, p. 122 (June 2, 1965). Public Law 89-32 vested DOE with authority to provide storage for Fort St. Vrain spent nuclear fuel independent of the Nuclear Waste Policy Act.

Idaho also argues that DOE was authorized only to purchase the Fort St. Vrain spent nuclear fuel for reprocessing. Although it was originally contemplated that the spent fuel would be reprocessed, neither Public Law 89-32 nor the contract limited DOE's purchasing authority to reprocessing. DOE's obligation to purchase the Fort St. Vrain spent fuel is not contingent on the reprocessing of the nuclear material.

Idaho argues that, even if the Nuclear Waste Policy Act does not apply to pre-existing storage agreements and DOE had independent authority to provide for the storage of Fort St. Vrain spent fuel, the 1988 modification was an agreement to store spent fuel subject to the Act. The original contract, as modified in 1980, required DOE to accept eight spent fuel segments. The original contract provided for an extension of the contract period based on "other specific provisions." The 1980 modification was a specific provision extending the contractual agreement until the delivery of eight spent fuel segments. The contracting parties do not dispute that DOE was under a pre-existing obligation to receive the spent fuel. The record does not contain evidence contrary to the parties expressed understanding. On this record, we must conclude that the 1988 modification merely clarified the parties' pre-existing obligations and did not constitute a separate contractual agreement.

Finally, Idaho argues that Public Service plans to deliver a ninth spent fuel segment to DOE. According to Idaho, DOE's contract defense cannot apply to this segment because the 1965 agreement and subsequent modifications provided for DOE to receive only eight spent fuel segments. Before Public Service delivers the ninth segment, however, Idaho's claims that the storage of Fort St. Vrain nuclear fuel poses environmental hazards presumably will be addressed by the district court. Because the district court is a more appropriate forum for the resolution of such fact-laden controversies, we hold that the final segment is an insufficient basis upon which to grant original and pendent jurisdiction in this court. *See Sandell v. Federal Aviation Admin.*, 923 F.2d 661, 664 (9th Cir. 1990) (ripeness doctrine is made up of policy considerations as well as Article III case or controversy requirement) (citing 13A Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction* 3532 (2d ed. 1984)). We make no determination regarding potential statutory limitations to such an action.

DISMISSED. This court's injunction, issued on May 14, 1991, is vacated. The mandate will issue now.

APPENDIX B

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CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 2286g of this title.

§ 10101. Definitions

For purposes of this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "affected Indian tribe" means any Indian tribe –

(A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located;

(B) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: *Provided*, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe;[1]

(3) The term "atomic energy defense activity" means any activity of the Secretary performed in whole or in part in carrying out any of the following functions:

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[1] So in original. The semicolon probably should be a period.

(A) naval reactors development;

(B) weapons activities including defense inertial confinement fusion;

(C) verification and control technology;

(D) defense nuclear materials production;

(E) defense nuclear waste and materials by-products management;

(F) defense nuclear materials security and safeguards and security investigations; and

(G) defense research and development.

(4) The term "candidate site" means an area, within a geologic and hydrologic system, that is recommended by the Secretary under section 10132 of this title for site characterization, approved by the President under section 10132 of this title for site characterization, or undergoing site characterization under section 10133 of this title.

(5) The term "civilian nuclear activity" means any atomic energy activity other than an atomic energy defense activity.

(6) The term "civilian nuclear powerplant reactor" means a civilian nuclear powerplant required to be licensed under section 2133 or 2134(b) of this title.

(7) The term "Commission" means the Nuclear Regulatory Commission.

(8) The term "Department" means the Department of Energy.

(9) The term "disposal" means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste.

(10) The terms "disposal package" and "package" mean the primary container that holds, and is in contact with, solidified high-level radioactive waste, spent nuclear fuel, or other radioactive materials, and any overpacks that are emplaced at a repository.

(11) The term "engineered barriers" means manmade components of a disposal system designed to prevent the release of radionuclides into the geologic medium involved. Such term includes the high-level radioactive waste form, high-level radioactive waste canisters, and other materials placed over and around such canisters.

(12) The term "high-level radioactive waste" means –

(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

(13) The term "Federal agency" means any Executive agency, as defined in section 105 of title 5.

(14) The term "Governor" means the chief executive officer of a State.

(15) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(c)).

(16) The term "low-level radioactive waste" means radioactive material that –

(A) is not high-level radioactive waste, spent nuclear fuel, transuranic waste, or by-product material as defined in section 2014(e)(2) of this title; and

(B) the Commission, consistent with existing law, classifies as low-level radioactive waste.

(17) The term "Office" means the Office of Civilian Radioactive Waste Management established in section 10224[2] of this title.

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[2] See References in Text note below.

(18) The term "repository" means any system licensed by the Commission that is intended to be used for, or may be used for, the permanent deep geologic disposal of high-level radioactive waste and spent nuclear fuel, whether or not such system is designed to permit the recovery, for a limited period during initial operation, of any materials placed in such system. Such term includes both surface and subsurface areas at which high-level radioactive waste and spent nuclear fuel handling activities are conducted.

(19) The term "reservation" means –

(A) any Indian reservation or dependent Indian community referred to in clause (a) or (b) of section 1151 of title 18; or

(B) any land selected by an Alaska Native village or regional corporation under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

(20) The term "Secretary" means the Secretary of Energy.

(21) The term "site characterization" means –

(A) siting research activities with respect to a test and evaluation facility at a candidate site; and

(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ

testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

(22) The term "siting research" means activities, including borings, surface excavations, shaft excavations, subsurface lateral excavations and borings, and in situ testing, to determine the suitability of a site for a test and evaluation facility.

(23) The term "spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

(24) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(25) The term "Storage" means retention of high-level radioactive waste, spent nuclear fuel, or transuranic waste with the intent to recover such waste or fuel for subsequent use, processing, or disposal.

(26) The term "Storage Fund" means the Interim Storage Fund established in section 10156(c)[3] of this title.

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[3] See References in Text note below.

(27) The term "test and evaluation facility" means an at-depth, prototypic, underground cavity with subsurface lateral excavations extending from a central shaft that is used for research and development purposes, including the development of data and experience for the safe handling and disposal of solidified high-level radioactive waste, transuranic waste, or spent nuclear fuel.

(28) The term "unit of general local government" means any borough, city, county, parish, town, township, village, or other general purpose political subdivision of a State.

(29) The term "Waste Fund" means the Nuclear Waste Fund established in section 10222(c) of this title.

(30) The term "Yucca Mountain site" means the candidate site in the State of Nevada recommended by the Secretary to the President under section 10132(b)(1)(B) of this title on May 27, 1986.

(31) The term "affected unit of local government" means the unit of local government with jurisdiction over the site of a repository or a monitored retrievable storage facility. Such term may, at the discretion of the Secretary, include units of local government that are contiguous with such unit.

(32) The term "Negotiator" means the Nuclear Waste Negotiator.

(33) As used in subchapter IV of this chapter, the term "Office" means the Office of the Nuclear Waste Negotiator established under subchapter IV of this chapter.

(34) The term "monitored retrievable storage facility" means the storage facility described in section 10161 (b)(1) of this title.

(Pub. L. 97-425, § 2, Jan. 7, 1983, 96 Stat. 2202; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5002, Dec. 22, 1987, 101 Stat. 1330-227.)

REFERENCES IN TEXT

Section 10224 of this title, referred to in par. (17), was in the original a reference to section 305 of Pub. L. 97-425, which is classified to section 10225 of this title, and was translated as section 10224 of this title as the probable intent of Congress, in view of the Office of Civilian Radioactive Waste Management being established by section 10224 of this title.

The Alaska Native Claims Settlement Act, referred to in par. (19)(B), is Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (§ 1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

Section 10156(c) of this title, referred to in par. (26), was in the original a reference to section 137(c) of Pub. L. 97-425, which is classified to section 10157(c) of this title, and has been translated as section 10156(c) of this title as the probable intent of Congress, in view of the Interim Storage Fund being established by section 10156(c) of this title.

AMENDMENTS

1987-Pars. (30) to (34). Pub. L. 100-202 and Pub. L. 100-203 amended section identically adding pars. (3) to (34).

SHORT TITLE OF 1987 AMENDMENT

Section 101(d) [title III] of Pub. L. 100-202 and section 5001 of title V of Pub. L. 100-203 provided that: "This subtitle [subtitle A (§ § 5001-5065) of title V, enacting sections 10162, 10163, 10164, 10165, 10166, 10167,10168, 10169, 10172, 10172a, 10173, 10173a, 10173b, 10173c, 10174, 10174a, 10175, 10204, 10241, 10242, 10243, 10244, 10245, 10246, 10247, 10248, 10249, 10250, 10251, 10261, 10262, 10263, 10264, 10265, 10266, 10267, 10268, 10269, and 10270 of this title, amending sections 10101, 10132, 10133, 10134, 10135, 10136, 10137, and 10138 of this title and enacting provisions set out as a note under section 5841 of this title] may be cited as the 'Nuclear Waste Policy Amendments Act of 1987'."

SHORT TITLE

Section 1 of Pub. L. 97-425 provided that: "This Act [enacting this chapter] may be cited as the 'Nuclear Waste Policy Act of 1982'."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2014 of this title

§ 10102. Separability of provisions

If any provision of this chapter, or the application of such provision to any person or circumstance, is held invalid, the remainder of this chapter, or the application

of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

(Pub. L. 97-425. § 3, Jan. 7, 1983, 96 Stat. 2205.)

§ 10103. Territories and possessions

Nothing in this chapter shall be deemed to repeal, modify, or amend the provisions of section 1491 of title 48.

(Pub. L. 97-425, § 4, Jan. 7, 1983, 96 Stat. 2205.)

§ 10104. Ocean disposal

Nothing in this chapter shall be deemed to affect the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.).

(Pub. L. 97-425, § 5, Jan. 7, 1983, 96 Stat. 2205.)

REFERENCES IN TEXT

The Marine Protection, Research, and Sanctuaries Act of 1972, referred to in text, is Pub. L. 92-532, Oct. 23, 1972, 86 Stat. 1052, as amended, which is classified principally to chapter 27 (§ 1401, et seq.) of Title 33. Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1401 of Title 33 and Tables.

§ 10105. Limitation on spending authority

The authority under this chapter to incur indebtedness, or enter into contracts, obligating amounts to be expended by the Federal Government shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.

(Pub. L. 97-425, § 6, Jan.7, 1983, 96 Stat. 2205.)

§ 10106. Protection of classified national security information

Nothing in this chapter shall require the release or disclosure to any person or to the Commission of any classified national security information.

(Pub. L. 97-425, § 7, Jan. 7, 1983, 96 Stat. 2205.)

§ 10107. Applicability to atomic energy defense activities

(a) Atomic energy defense activities

Subject to the provisions of subsection (c) of this section, the provisions of this chapter shall not apply with respect to any atomic energy defense activity or to any facility used in connection with any such activity.

(b) Evaluation by President

(1) Not later than 2 years after January 7, 1983, the President shall evaluate the use of disposal capacity at one or more repositories to be developed under part A of subchapter I of this chapter for the disposal of high-level

radioactive waste resulting from atomic energy defense activities. Such evaluation shall take into consideration factors relating to cost efficiency, health and safety, regulation, transportation, public acceptability, and national security.

(2) Unless the President finds, after conducting the evaluation required in paragraph (1), that the development of a repository for the disposal of high-level radioactive waste resulting from atomic energy defense activities only is required, taking into account all of the factors described in such subsection, the Secretary shall proceed promptly with arrangement for the use of one or more of the repositories to be developed under part A of subchapter I of this chapter for the disposal of such waste. Such arrangements shall include the allocation of costs of developing, constructing, and operating this repository or repositories. The costs resulting from permanent disposal of high-level radioactive waste from atomic energy defense activities shall be paid by the Federal Government, into the special account established under section 10222 of this title.

(3) Any repository for the disposal of high-level radioactive waste resulting from atomic energy defense activities only shall (A) be subject to licensing under section 5842 of this title; and (B) comply with all requirements of the Commission for the siting, development, construction, and operation of a repository.

(c) Applicability to certain repositories

The provisions of this chapter shall apply with respect to any repository not used exclusively for the

disposal of high-level radioactive waste or spent nuclear fuel resulting from atomic energy defense activities, research and development activities of the Secretary, or both.

(Pub. L. 97-425, § 8, Jan. 7, 1983, 96 Stat. 2205.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10121, 10155, 10192 of this title.

§ 10108. Applicability to transportation

Nothing in this chapter shall be construed to affect Federal, State or local laws pertaining to the transportation of spent nuclear fuel or high-level radioactive waste.

(Pub. L. 97-425, § 9, Jan. 7, 1983, 96 Stat. 2206.)

SUBCHAPTER I-DISPOSAL AND STORAGE OF HIGH-LEVEL RADIOACTIVE WASTE, SPENT NUCLEAR FUEL, AND LOW-LEVEL RADIOACTIVE WASTE

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 10222, 10225 of this title.

§ 10121. State and affected Indian tribe participation in development of proposed repositories for defense waste

(a) Notification to States and affected Indian tribes

Notwithstanding the provisions of section 10107 of this title, upon any decision by the Secretary or the

President to develop a repository for the disposal of high-level radioactive waste or spent nuclear fuel resulting exclusively from atomic energy defense activities, research and development activities of the secretary, or both, and before proceeding with any site-specific investigation with respect to such repository, the Secretary shall notify the Governor and legislature of the State in which such repository is proposed to be located, or the governing body of the affected Indian tribe on whose reservation such repository is proposed to be located, as the case may be, of such decision.

(b) Participation of States and affected Indian tribes

Following the receipt of any notification under subsection (a) of this section, the State or Indian tribe involved shall be entitled, with respect to the proposed repository involved, to rights of participation and consultation identical to those provided in sections 10135 through 10138 of this title, except that any financial assistance authorized to be provided to such State or affected Indian tribe under section 10136(c) or 10138(b) of this title shall be made from amounts appropriated to the Secretary for purposes of carrying out this section.

(Pub. L. 97-425, title I, § 101, Jan. 7, 1983, 96 Stat. 2206.)

PART A – REPOSITORIES FOR DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL

PART REFERRED TO IN OTHER SECTIONS

This part is referred to in sections 10107, 10175 of this title.

§ 10131. Findings and purposes

(a) The Congress finds that –

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) While the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence

in the safety of disposal of such waste and spent fuel; and

(7) High-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) The purposes of this part are –

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

(Pub. L. 97-425, title I, § 111, Jan. 7, 1983, 96 Stat.2207.)

§ 10132. Recommendation of candidate sites for site characterization

(a) Guidelines

Not later than 180 days after January 7, 1983, the Secretary, following consultation with the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Director of the Geological Survey, and interested Governors, and the concurrence of the Commission shall issue general guidelines for the recommendation of sites for repositories. Such guidelines shall specify detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media. Such guidelines shall specify factors that qualify or disqualify any site from development as a repository, including factors pertaining to the location of valuable natural resources, hydrology, geophysics, seismic activity, and atomic energy defense activities, proximity to water supplies, proximity to populations, the effect upon the rights of users of water, and proximity to components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Lands. Such guidelines shall take into consideration the proximity to sites where high-level radioactive waste and spent nuclear fuel is generated or temporarily stored and the transportation and safety factors involved in moving such waste to a repository. Such guidelines shall specify population factors that will disqualify any site from development as a repository if any surface facility of such repository would be located (1) in a highly populated area; or (2) adjacent to an area 1 mile

by 1 mile having a population of not less than 1,000 individuals. Such guidelines also shall require the Secretary to consider the cost and impact of transporting to the repository site the solidified high-level radioactive waste and spent fuel to be disposed of in the repository and the advantages of regional distribution in the siting of repositories. Such guidelines shall require the Secretary to consider the various geologic media in which sites for repositories may be located and, to the extent practicable, to recommend sites in different geologic media. The Secretary shall use guidelines established under this subsection in considering candidate sites for recommendation under subsection (b) of this section. The Secretary may revise such guidelines from time to time, consistent with the provisions of this subsection.

(b) Recommendation by Secretary to President

(1)(A) Following the issuance of guidelines under subsection (a) of this section and consultation with the Governors of affected States, the Secretary shall nominate at least 5 sites that he determines suitable for site characterization for selection of the first repository site.

(B) Subsequent to such nomination, the Secretary shall recommend to the President 3 of the nominated sites not later than January 1, 1985 for characterization as candidate sites.

(C) Such recommendations under subparagraph (B) shall be consistent with the provisions of section 10225 of this title.

(D) Each nomination of a site under this subsection shall be accompanied by an environmental assessment, which shall include a detailed statement of the basis for such recommendation and of the probable impacts of the site characterization activities planned for such site, and a discussion of alternative activities relating to site characterization that may be undertaken to avoid such impacts. Such environmental assessment shall include –

(i) an evaluation by the Secretary as to whether such site is suitable for site characterization under the guidelines established under subsection (a) of this section;

(ii) an evaluation by the Secretary as to whether such site is suitable for development as a repository under each such guideline that does not require site characterization as a prerequisite for application of such guideline;

(iii) an evaluation by the Secretary of the effects of the site characterization activities at such site on the public health and safety and the environment;

(iv) a reasonable comparative evaluation by the Secretary of such site with other sites and locations that have been considered;

(v) a description of the decision process by which such site was recommended; and

(vi) an assessment of the regional and local impacts of locating the proposed repository at such site.

(E)(i)[1] The issuance of any environmental assessment under this paragraph shall be considered to be a

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[1] So in original. There is no cl. (ii).

final agency action subject to judicial review in accordance with the provisions of chapter 7 of title 5 and section 10139 of this title. Such judicial review shall be limited to the sufficiency of such environmental assessment with respect to the items described in clauses (i) through (vi) of subparagraph (E).

(F) Each environmental assessment prepared under this paragraph shall be made available to the public.

(G) Before nominating a site, the Secretary shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, of such nomination and the basis for such nomination.

(2) Before nominating any site the Secretary shall hold public hearings in the vicinity of such site to inform the residents of the area in which such site is located of the proposed nomination of such site and to receive their comments. At such hearings, the Secretary shall also solicit and receive any recommendations of such residents with respect to issues that should be addressed in the environmental assessment described in paragraph (1) and the site characterization plan described in section 10133(b)(1) of this title.

(3) In evaluating the sites nominated under this section prior to any decision to recommend a site as a candidate site, the Secretary shall use available geophysical, geologic, geochemical and hydrologic, and other information and shall not conduct any preliminary borings or excavations at a site unless (i) such preliminary

boring or excavation activities were in progress on January 7, 1983, or (ii) the Secretary certifies that such available information from other sources, in the absence of preliminary borings or excavations, will not be adequate to satisfy applicable requirements of this chapter or any other law: *Provided*, That preliminary borings or excavations under this section shall not exceed a diameter of 6 inches.

(c) Presidential review of recommended candidate sites

(1) The President shall review each candidate site recommendation made by the Secretary under subsection (b) of this section. Not later than 60 days after the submission by the Secretary of a recommendation of a candidate site, the President, in his discretion, may either approve or disapprove such candidate site, and shall transmit any such decision to the Secretary and to either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be. If, during such 60-day period, the President fails to approve or disapprove such candidate site, or fails to invoke his authority under paragraph (2) to delay his decision, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(2) The President may delay for not more than 6 months his decision under paragraph (1) to approve or

disapprove a candidate site, upon determining that the information provided with the recommendation of the Secretary is insufficient to permit a decision within the 60-day period referred to in paragraph (1). The President may invoke his authority under this paragraph by submitting written notice to the Congress, within such 60-day period, of his intent to invoke such authority. If the President invokes such authority, but fails to approve or disapprove the candidate site involved by the end of such 6-month period, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(d) Preliminary activities

Except as otherwise provided in this section, each activity of the President or the Secretary under this section shall be considered to be a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(Pub. L. 97-425, title I, § 112, Jan. 7, 1983, 96 Stat. 2208; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5011(b)-(d), Dec. 22, 1987, 101 Stat. 1330-228.)

AMENDMENTS

1987 – Subsec. (b)(1)(C) to (H). Pub. L. 100-202 and Pub. L. 100-203 § 5011(b), amended par. (1) identically, redesignating subpars. (D) to (H) as (C) to (G), respectively, in subpar. (C) substituting "subparagraph (B)" for "subparagraphs (B) and (C)", and striking out former subpar. (C) which read as follows: "Not later than July 1, 1989, the Secretary shall nominate 5 sites, which shall include at least 3 additional sites not nominated under subparagraph (A), and recommend by such date to the President from such 5 nominated sites 3 candidate sites the Secretary determines suitable for site characterization for selection of the second repository. The Secretary may not nominate any site previously nominated under subparagraph (A), that was not recommended as a candidate site under subparagraph (B)."

Subsec. (d). Pub. L. 100-202 and Pub. L. 100-203, § 5011(c), amended section identically, redesignating subsec. (e) and (d) and striking out former subsec (d) which read as follows: "After the required recommendation of candidate sites under subsection (b) of this section, the Secretary may continue, as he determines necessary, to identify and study other sites to determine their suitability for recommendation for site characterization, in accordance with the procedures described in this section."

Subsec. (e). Pub. L. 100-202 and Pub. L. 100-203, § 5011(d), which contained identical amendments directing that subsec. (f) be struck out and all subsequent subsections be redesignated accordingly, was executed by striking out subsec. (e) as the probable intent of Congress because of the redesignation of former subsec. (f) as (e) by Pub. L. 100-202 and Pub. L. 100-203, § 5011(c), and the absence of any subsections subsequent to former subsec. (f). Subsec. (e) read as follows: "Nothing in this section

may be construed as prohibiting the Secretary from continuing ongoing or presently planned site characterization at any site on Department of Energy land for which the location of the principal borehole has been approved by the Secretary by August 1, 1982, except that (1) the environmental assessment described in subsection (b)(1) of this section shall be prepared and made available to the public before proceeding to sink shafts at any such site; and (2) the Secretary shall not continue site characterization at any such site unless such site is among the candidate sites recommended by the Secretary under the first sentence of subsection (b) of this section for site characterization and approved by the President under subsection (c) of this section; and (3) the Secretary shall conduct public hearings under section 10133(b)(2) of this title and comply with requirements under section 10137 of this title within one year of January 7, 1983."

Pub. L. 100-202 and Pub. L. 100-203, § 5011(c) amended section identically, redesignating subsec. (f) as (e). Former subsec. (e) redesignated (d).

Subsec. (f) Pub. L. 100-202 and Pub. L. 100-203 § 5011(c), amended section identically, redesignating subsec. (f) as (e).

DELEGATION OF NOTIFICATION FUNCTION

Letter of the President of the United States, dated May 28, 1986, 51 F.R.19531, provided:

Letter to the Honorable John S. Herrington, Secretary of Energy

Dear Mr. Secretary:

You are hereby authorized to perform the notification function vested in the President pursuant to Section 112(c)(1) of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10132(c)(1).

This document shall be published in the Federal Register.

Sincerely,

RONALD REAGAN.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10101, 10133, 10137, 10138, 10139, 10161, 10172a, 10221 of this title.

§ 10133. Site characterization

(a) In general

The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities at the Yucca Mountain site. The Secretary shall consider fully the comments received under subsection (b)(2) of this section and section 10132(b)(2) of this title and shall, to the maximum extent practicable and in consultation with the Governor of the State of Nevada, conduct site characterization activities in a manner that minimizes any significant adverse environmental impacts identified in such comments or in the environmental assessment submitted under subsection (b)(1) of this section.

(b) Commission and States

(1) Before proceeding to sink shafts at the Yucca Mountain site, the Secretary shall submit for such candidate site to the Commission and to the Governor or

legislature of the State of Nevada, for their review and comment –

(A) a general plan for site characterization activities to be conducted at such candidate site, which plan shall include –

(i) a description of such candidate site;

(ii) a description of such site characterization activities, including the following: the extent of planned excavations, plans for any onsite testing with radioactive or nonradioactive material, plans for any investigation activities that may affect the capability of such candidate site to isolate high-level radioactive waste and spent nuclear fuel, and plans to control any adverse, safety-related impacts from such site characterization activities;

(iii) plans for the decontamination and decommissioning of such candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities if it is determined unsuitable for application for a construction authorization for a repository;

(iv) criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 10132(a) of this title; and

(v) any other information required by the Commission;

(B) a description of the possible form or packaging for the high-level radioactive waste and spent nuclear fuel to be emplaced in such

repository, a description, to the extent practicable, of the relationship between such waste form or packaging and the geologic medium of such site, and a description of the activities being conducted by the Secretary with respect to such possible waste form or packaging or such relationship; and

(C) a conceptual repository design that takes into account likely site-specific requirements.

(2) Before proceeding to sink shafts at the Yucca Mountain site, the Secretary shall (A) make available to the public the site characterization plan described in paragraph (1); and (B) hold public hearings in the vicinity of such candidate site to inform the residents of the area in which such candidate site is located of such plan, and to receive their comments.

(3) During the conduct of site characterization activities at the Yucca Mountain site, the Secretary shall report not less than once every 6 months to the Commission and to the Governor and legislature of the State of Nevada, on the nature and extent of such activities and the information developed from such activities.

(c) Restrictions.

(1) The Secretary may conduct at the Yucca Mountain site only such site characterization activities as the Secretary considers necessary to provide the data required for evaluation of the suitability of such site for an application to be submitted to the Commission for a construction authorization for a repository at such site,

and for compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) In conducting site characterization activities –

(A) the Secretary may not use any radioactive material at a site unless the Commission concurs that such use is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a repository at such site; and

(B) if any radioactive material is used at a site –

(i) the Secretary shall use the minimum quantity necessary to determine the suitability of such site for a repository, but in no event more than the curie equivalent of 10 metric tons of spent nuclear fuel; and

(ii) such radioactive material shall be fully retrievable.

(3) If the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall –

(A) terminate all site characterization activities at such site;

(B) notify the Congress, the Governor and legislature of Nevada of such termination and the reasons for such termination;

(C) remove any high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such site as promptly as practicable;

(D) take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities at such site;

(E) suspend all future benefits payments under part F of this subchapter with respect to such site; and

(F) report to Congress not later than 6 months after such determination the Secretary's recommendations for further action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority.

(d) Preliminary activities

Each activity of the Secretary under this section that is in compliance with the provisions of subsection (c) of this section shall be considered a preliminary decision-making activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to[2] require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(Pub.L. 97-425, title I, § 113, Jan. 7, 1983, 96 Stat. 2211; Pub. L. 100-202 § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5011(e)-(g), Dec. 22, 1987, 101 Stat. 1330-228.)

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[2] So in original. The word "to" probably should not appear.

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (c)(1), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

AMENDMENTS

1987 – Subsec. (a) Pub. L. 100-202 and Pub. L. 100-203, § 5011(e)(2), which contained identical amendments directing that "at the Yucca Mountain site" be substituted for "beginning" and all that follows through "geological media", were executed by substituting "at the Yucca Mountain site" for "beginning with the candidate sites that have been approved under section 10132 of this title and are located in various geologic media" as the probable intent of Congress.

Pub. L. 100-102 and Pub. L. 100-203, § 5011(e)(1), amended subsec. (a) identically, substituting "State of Nevada" for "State involved or the governing body of the affected Indian tribe involved".

Subsec. (b)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(1), amended par. (1) identically, substituting "the Yucca Mountain site" for "a candidate site", and "the Governor or legislature of the State of Nevada" for "either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe on whose reservation such candidate site is located, as the case may be".

Subsec. (b)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(2), amended par. (2) identically substituting "the Yucca Mountain site" for "any candidate site".

Subsec. (b)(3). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(3), amended par. (3) identically, substituting "the Yucca Mountain site" for "a candidate site", striking "either" before "the Governor", and substituting "the State of Nevada" for "the State in which such candidate site is located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be".

Subsec. (c)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(1), amended par. (1) identically, substituting "the Yucca Mountain site" for "any candidate site", "suitability of such site" for "suitability of such candidate site", and "repository at such site" for "repository at such candidate site".

Subsec. (c)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(2), amended par. (2) identically, striking out "candidate" before "site" in two places in subpar. (A) and in two places in subpar. (B).

Subsec. (c)(3), (4). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(3), amended subsec. (c) identically adding par. (3) and striking out former pars. (3) and (4) which read as follows:

"(3) If site characterization activities are terminated at a candidate site for any reason, the Secretary shall (A) notify the Congress, the Governors and legislatures of all States in which candidate sites are located, and the governing bodies of all affected Indian tribes where candidate sites are located, of such termination and the reasons for such termination; and (B) remove any high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such candidate site as promptly as practicable.

"(4) If a site is determined to be unsuitable for application for a construction authorization for a repository, the Secretary shall take reasonable and necessary steps to

reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10101, 10132, 10134, 10136, 10244, 10245 of this title.

§ 10134. Site approval and construction authorization

(a) Hearings and Presidential recommendation

(1) The Secretary shall hold public hearings in the vicinity of the Yucca Mountain site, for the purposes of informing the residents of the area of such consideration and receiving their comments regarding the possible recommendation of such site. If, upon completion of such hearings and completion of site characterization activities at the Yucca Mountain site, under section 10133 of this title, the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State of Nevada, of such decision. No sooner than the expiration of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 10133 of this title and this section, including the information described in subparagraph (A) through subparagraph (G). Together with any recommendation of a site under this paragraph, the Secretary shall make available to the public, and submit to the President,

a comprehensive statement of the basis of such recommendation, including the following:

(A) a description of the proposed repository, including preliminary engineering specifications for the facility;

(B) a description of the waste form or packaging proposed for use at such repository, and an explanation of the relationship between such waste form or packaging and the geologic medium of such site;

(C) a discussion of data, obtained in site characterization activities, relating to the safety of such site;

(D) a final environmental impact statement prepared for the Yucca Mountain site pursuant to subsection (f) of this section and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that the Secretary shall not be required in any such environmental impact statement to consider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site;

(E) preliminary comments of the Commission concerning the extent to which the at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository;

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

(G) such other information as the Secretary considers appropriate; and

(H) any impact report submitted under section 10136(c)(2)(B) of this title by the State of Nevada.

(2)(A) If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository, the President shall submit a recommendation of such site to Congress.

(B) The President shall submit with such recommendation a copy of the statement for such site prepared by the Secretary under paragraph (1).

(3)(A) The President may not recommend the approval of the Yucca Mountain site unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a statement for such site as required under such paragraph.

(B) No recommendation of a site by the President under this subsection shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to[3] require any environmental

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[3] So in original. The word "to" probably should not appear.

review under subparagraph (E) or (F) of section 102(2) of such Act.

(b) Submission of application

If the President recommends to the Congress the Yucca Mountain site under subsection (a) of this section and the site designation is permitted to take effect under section 10135 of this title, the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective under such section and shall provide to the Governor and legislature of the State of Nevada a copy of such application.

(c) Status report on application

Not later than 1 year after the date on which an application for a construction authorization is submitted under subsection (b) of this section, and annually thereafter until the date on which such authorization is granted, the Commission shall submit a report to the Congress describing the proceedings undertaken through the date of such report with regard to such application, including a description of –

(1) any major unresolved safety issues, and the explanation of the Secretary with respect to design and operation plans for resolving such issues;

(2) any matters of contention regarding such application; and

(3) any Commission actions regarding the granting or denial of such authorization.

(d) Commission action

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection (e)(2) of this section. The Commission decision approving the first such application shall prohibit the emplacement in the first repository of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of such a quantity of spent fuel until such time as a second repository is in operation. In the event that a monitored retrievable storage facility, approved pursuant to part C of this subchapter, shall be located, or is planned to be located, within 50 miles of the first repository, then the Commission decision approving the first such application shall prohibit the emplacement of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of spent fuel in both the repository and monitored

retrievable storage facility until such time as a second repository is in operation.

(e) Project decision schedule

(1) The Secretary shall prepare and update, as appropriate, in cooperation with all affected Federal agencies, a project decision schedule that portrays the optimum way to attain the operation of the repository, within the time periods specified in this part. Such schedule shall include a description of objectives and a sequence of deadlines for all Federal agencies required to take action, including an identification of the activities in which a delay in the start, or completion of such activities will cause a delay in beginning repository operation.

(2) Any Federal agency that determines that it cannot comply with any deadline in the project decision schedule, or fails to so comply, shall submit to the Secretary and to the Congress a written report explaining the reason for its failure or expected failure to meet such deadline, the reason why such agency could not reach an agreement with the Secretary, the estimated time for completion of the activity or activities involved, the associated effect on its other deadlines in the project decision schedule, and any recommendations it may have or actions it intends to take regarding any improvements in its operation or organization, or changes to its statutory directives or authority, so that it will be able to mitigate the delay involved. The Secretary, within 30 days after receiving any such report, shall file with the Congress his response to such report, including the reasons why the

Secretary could not amend the project decision schedule to accommodate the Federal agency involved.

(f) Environmental impact statement

(1) Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). A final environmental impact statement prepared by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

(2) With respect to the requirements imposed by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this chapter shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository.

(3) For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and this section, the Secretary need not consider alternate sites to the Yucca Mountain site for the repository to be developed under this part.

(4) Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this part shall, to the

extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(5) Nothing in this chapter shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission established in title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.).

(6) In any such statement prepared with respect to the repository to be constructed under this part, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or non-geologic alternatives to such site.

(Pub. L. 97-425, title I, § 114, Jan. 7, 1983, 96 Stat. 2213; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5011(h)-(*l*), Dec. 22, 1987, 101 Stat. 1330-229, 1330-230.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsecs. (a)(1)(D) and (f), Pub. L. 91-190,

Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

The Atomic Energy Act of 1954, referred to in subsec. (f)(4), is act Aug. 30, 1954, ch. 1073, 68 Stat. 921, as amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Energy Reorganization Act of 1974, referred to in subsec. (f)(5), is Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233, as amended. Title II of the Energy Reorganization Act of 1974 is classified generally to subchapter II (§ 5841 et seq.) of chapter 73 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5801 of this title and Tables.

AMENDMENTS

1987 – Subsec. (a)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(A)-(E), amended par. (1) identically, in introductory provisions substituting "vicinity of the Yucca Mountain site" for "vicinity of each site under consideration for recommendation to the President under this paragraph as a site for the development of a repository", striking out "in which such site is located" after "residents of the area", substituting "activities at the Yucca Mountain site" for "activities at not less than 3 candidate sites for the first proposed repository, or from all of the characterized sites for the development of subsequent respositories" and "of Nevada" for "in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be", and struck out before last sentence "In making site recommendations and approvals subsequent to the first

site recommendation, the Secretary and the President, respectively, shall also consider the need for regional distribution of repositories and the need to minimize, to the extent practicable, the impacts and cost of transporting spent fuel and solidified high-level radioactive waste."

Subsec. (a)(1)(D). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(F), generally amended subpar. (D) identically. Prior to amendment, subpar. (D) read as follows: "a final environmental impact statement prepared pursuant to subsection (f) of this section and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), including an analysis of the consideration given by the Secretary to not less than 3 candidate sites for the first proposed respository [sic] or to all of the characterized sites for the development of subsequent repositories, with respect to which site characterization is completed under section 10133 of this title, together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on environmental Quality, the Administrator, and the Commission, except that any such environmental impact statement concerning the first repository to be developed under this chapter shall not be required to consider the need for a repository or the alternatives to geologic disposal;".

Subsec. (a)(1)(H). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(G), amended subpar. (H) identically, substituting "the State of Nevada" for "the State in which such site is located, or under section 10138(b)(3)(B) of this title by the affected Indian tribe where such site is located, as the case may be".

Subsec. (a)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(2), amended subsec. (a) identically, adding par. (2) and striking out former par. (2) which required submission of recommendation of one site for repository not later than Mar. 31, 1987, and recommendation of second

site not later than Mar. 31, 1990, and permitted subsequent recommendations for other sites and extension of deadlines.

Subsec. (a)(3), (4). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(2), (3), amended subsec. (a) identically, redesignating par. (4) as (3), in subpar. (A), substituting "the Yucca Mountain site" for "any site under this subsection" and "statement" for "report", and striking out former par. (3) which read as follows: "If approval of any such site recommendation does not take effect as a result of a disapproval by the Governor or legislature of a State under section 10136 of this title or the governing body of an affected Indian tribe under section 10138 of this title, the President shall submit to the Congress, not later than 1 year after the disapproval of such recommendation, a recommendation of another site for the first or subsequent repository."

Subsec. (b). Pub. L. 100-202 and Pub. L. 100-203, § 5011(i), amended subsec. (b) identically, substituting "the Yucca Mountain site" for "a site for a repository" and "State of Nevada" for "State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be,".

Subsec. (d). Pub. L. 100-202 and Pub. L. 100-203, § 5011(j), amended subsec. (d) identically, substituting "than the expiration" for "than – (1) January 1, 1989, for the first such application, and January 1, 1992 for the second such application; or (2) the expiration" and "subsection (e)(2) of this section" for "subsection (e)(2) of this section; whichever occurs later".

Subsec. (e)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(k), amended par. (1) identically, substituting "operation of the repository" for "operation of the repository involved".

Subsec. (f). Pub. L. 100-202 and Pub. L. 100-203, § 5011(*l*), generally amended subsec. (f) identically, substituting provisions consisting of pars. (1) to (6) for former provisions consisting of single unnumbered par.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10135, 10136, 10138, 10142, 10165 of this title.

§ 10135. Review of repository site selection

(a) "Resolution of repository siting approval" defined

For purposes of this section, the term "resolution of repository siting approval" means a joint resolution of the Congress, the matter after the resolving clause of which is as follows: "That there hereby is approved the site at ___ for a repository, with respect to which a notice of disapproval was submitted by ___ on ___". The first blank space is such resolution shall be filled with the name of the geographic location of the proposed site of the repository to which such resolution pertains; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or Indian tribe governing body submitting the notice of disapproval to which such resolution pertains; and the last blank space in such resolution shall be filled with the date of such submission.

(b) State or Indian tribe petitions

The designation of a site as suitable for application for a construction authorization for a repository shall be effective at the end of the 60-day period beginning on the

date that the President recommends such site to the Congress under section 10134 of this title, unless the Governor and legislature of the State in which such site is located, or the governing body of an Indian tribe on whose reservation such site is located, as the case may be, has submitted to the Congress a notice of disapproval under section 10136 or 10138 of this title. If any such notice of disapproval has been submitted, the designation of such site shall not be effective except as provided under subsection (c) of this section.

(c) Congressional review of petitions

If any notice of disapproval of a repository site designation has been submitted to the Congress under section 10136 or 10138 of this title after a recommendation for approval of such site is made by the President under section 10134 of this title, such site shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress after the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution of repository siting approval in accordance with this subsection approving such site, and such resolution thereafter becomes law.

(d) Procedures applicable to the Senate

(1) The provisions of this subsection are enacted by the Congress –

(A) as an exercise of the rulemaking power of the Senate, and as such they are deemed a part of the rules of the Senate, but applicable

only with respect to the procedure to be followed in the Senate in the case of resolutions of repository siting approval, and such provisions supersede other rules of the Senate only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the Senate to change the rules (so far as relating to the procedure of the Senate) at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(2)(A) Not later than the first day of session following the day on which any notice of disapproval of a repository site selection is submitted to the Congress under section 10136 or 10138 of this title, a resolution of repository siting approval shall be introduced (by request) in the Senate by the chairman of the committee to which such notice of disapproval is referred, or by a Member or Members of the Senate designated by such chairman.

(B) Upon introduction, a resolution of repository siting approval shall be referred to the appropriate committee or committees of the Senate by the President of the Senate, and all such resolutions with respect to the same repository site shall be referred to the same committee or committees. Upon the expiration of 60 calendar days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall make its recommendations to the Senate.

(3) If any committee to which is referred a resolution of siting approval introduced under paragraph (2)(A), or, in the absence of such a resolution, any other resolution of siting approval introduced with respect to the site involved, has not reported such resolution at the end of 60 days of continuous session of Congress after introduction of such resolution, such committee shall be deemed to be discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the Senate.

(4)(A) When each committee to which a resolution of siting approval has been referred has reported, or has been deemed to be discharged from further consideration of, a resolution described in paragraph (3), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) for any Member of the Senate to move to proceed to the consideration of such resolution. Such motion shall be highly privileged and shall not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which such motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of such resolution is agreed to, such resolution shall remain the unfinished business of the Senate until disposed of.

(B) Debate on a resolution of siting approval, and on all debatable motions and appeals in connection with such resolution, shall be limited to not more than 10 hours, which shall be divided equally between Members favoring and Members opposing such resolution. A motion further to limit debate shall be in order and shall

not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to proceed to the consideration of other business, and a motion to recommit such resolution shall not be in order. A motion to reconsider the vote by which such resolution is agreed to or disagreed to shall not be in order.

(C) Immediately following the conclusion of the debate on a resolution of siting approval, and a single quorum call at the conclusion of such debate if requested in accordance with the rules of the Senate, the vote on final approval of such resolution shall occur.

(D) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a resolution of siting approval shall be decided without debate.

(5) If the Senate receives from the House a resolution of repository siting approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the House with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the Senate with respect to such site –

(i) the procedure with respect to that or other resolutions of the Senate with respect to such site shall be the same as if no resolution from the House with respect to such site had been received; but

(ii) on any vote on final passage of a resolution of the Senate with respect to such site, a resolution from the House with

respect to such site where the text is identical shall be automatically substituted for the resolution of the Senate.

(e) Procedures applicable to the House of Representatives

(1) The provisions of this section are enacted by the Congress –

(A) As an exercise of the rulemaking power of the House of Representatives, and as such they are deemed a part of the rules of the House, but applicable only with respect to the procedure to be followed in the House in case of resolutions of repository siting approval, and such provisions supersede other rules of the House only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the House to change the rules (so far as relating to the procedure of the House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) Resolutions of repository siting approval shall upon introduction, be immediately referred by the Speaker of the House to the appropriate committee or committees of the House. Any such resolution received from the Senate shall be held at the Speaker's table.

(3) Upon the expiration of 60 days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall be

discharged from further consideration of such resolution, and such resolution shall be referred to the appropriate calendar, unless such resolution or an identical resolution was previously reported by each committee to which it was referred.

(4) It shall be in order for the Speaker to recognize a Member favoring a resolution to call up a resolution of repository siting approval after it has been on the appropriate calendar for 5 legislative days. When any such resolution is called up, the House shall proceed to its immediate consideration and the Speaker shall recognize the Member calling up such resolution and a Member opposed to such resolution for 2 hours of debate in the House, to be equally divided and controlled by such Members. When such time has expired, the previous question shall be considered as ordered on the resolution to adopting without intervening motion. No amendment to any such resolution shall be in order, nor shall it be in order to move to reconsider the vote by which such resolution is agreed to or disagreed to.

(5) If the House receives from the Senate a resolution of repository siting approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the Senate with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the House with respect to such site –

(i) the procedure with respect to that or other resolutions of the House with respect to such site shall be the same as if

no resolution from the Senate with respect to such site had been received; but

(ii) on any vote on final passage of a resolution of the House with respect to such site, a resolution from the Senate with respect to such site where the text is identical shall be automatically substituted for the resolution of the House.

(f) Computation of days

For purposes of this section –

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 90-day period referred to in subsection (c) of this section and the 60-day period referred to in subsections (d) and (e) of this section.

(g) Information provided to Congress

In considering any notice of disapproval submitted to the Congress under section 10136 or 10138 of this title, the Congress may obtain any comments of the Commission with respect to such notice of disapproval. The provision of such comments by the Commission shall not be construed as binding the Commission with respect to any licensing or authorization action concerning the repository involved.

(Pub. L. 97-425, title I, § 115, Jan. 7, 1983, 96 Stat. 2217.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10121, 10134, 10136, 10138, 10155, 10161, 10168, 10225 of this title.

§ 10136. Participation of States

(a) Notification of States and affected tribes

The Secretary shall identify the States with one or more potentially acceptable sites for a repository within 90 days after January 7, 1983. Within 90 days of such identification, the Secretary shall notify the Governor, the State legislature, and the tribal council of any affected Indian tribe in any State of the potentially acceptable sites within such State. For the purposes of this subchapter, the term "potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

(b) State participation in repository siting decisions

(1) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under paragraph (2). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this part to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(2) Upon the submission by the President to the Congress of a recommendation of a site for a repository,

the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval. Such Governor or legislature may submit such a notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why such Governor or legislature disapproved the recommended repository site involved.

(3) The authority of the Governor or legislature of each State under this subsection shall not be applicable with respect to any site located on a reservation.

(c) Financial assistance

(1)(A) The Secretary shall make grants to the State of Nevada and any affected unit of local government for the purpose of participating in activities required by this section and section 10137 of this title or authorized by written agreement entered into pursuant to section 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such State or affected unit of local government, may not be considered eligible for funding under this paragraph.

(B) The Secretary shall make grants to the State of Nevada and any affected unit of local government of

purposes of enabling such State or affected unit of local government –

(i) to review activities taken under this part with respect to the Yucca Mountain site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of a repository on such State, or affected unit of local government and its residents;

(ii) to develop a request for impact assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to Nevada residents regarding any activities of such State, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this part with respect to such site.

(C) Any salary or travel expense that would ordinarily be incurred by the State of Nevada or any affected unit of local government may not be considered eligible for funding under this paragraph.

(2)(A)(i) The Secretary shall provide financial and technical assistance to the State of Nevada, and any affected unit of local government requesting such assistance.

(ii) Such assistance shall be designed to mitigate the impact on such State or affected unit of local government

of the development of such repository and the characterization of such site.

(iii) Such assistance to such State or affected unit of local government of such State shall commence upon the initiation of site characterization activities.

(B) The State of Nevada and any affected unit of local government may request assistance under this subsection by preparing and submitting to the Secretary a report on the economic, social, public health and safety, and environmental impacts that are likely to result from site characterization activities at the Yucca Mountain site. Such report shall be submitted to the Secretary after the Secretary has submitted to the State a general plan for site characterization activities under section 10133(b) of this title.

(C) As soon as practicable after the Secretary has submitted such site characterization plan, the Secretary shall seek to enter into a binding agreement with the State of Nevada setting forth –

(i) the amount of assistance to be provided under this subsection to such State or affected unit of local government; and

(ii) the procedures to be followed in providing such assistance.

(3)(A) In addition to financial assistance provided under paragraphs (1) and (2), the Secretary shall grant to the State of Nevada and any affected unit of local government an amount each fiscal year equal to the amount such State or affected unit of local government, respectively, would receive if authorized to tax site characterization activities at such site, and the development and

operation of such repository, as such State or affected unit of local government taxes the non-Federal real property and industrial activities occurring within such State or affected unit of local government.

(B) Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(4)(A) The State of Nevada or any affected unit of local government may not receive any grant under paragraph (1) after the expiration of the 1-year period following –

(i) the date on which the Secretary notifies the Governor and legislature of the State of Nevada of the termination of site characterization activities at the site in such State;

(ii) the date on which the Yucca Mountain site is disapproved under section 10135 of this title; or

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;

whichever occurs first.

(B) The State of Nevada or any affected unit of local government may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities or site characterization activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a

repository in a State, no Federal funds, shall be made available to such State or affected unit of local government under paragraph (1) or (2), except for –

(i) such funds as may be necessary to support activities related to any other repository located in, or proposed to be located in, such State, and for which a license to receive and possess has not been in effect for more than 1 year;

(ii) such funds as may be necessary to support State activities pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such State with the Secretary during such 2-year period; and

(iii) such funds as may be provided under an agreement entered into under subchapter IV of this chapter.

(5) Financial assistance authorized in this subsection shall be made out of amounts held in the Waste Fund.

(6) No State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987.

(d) Additional notification and consultation

Whenever the Secretary is required under any provision of this chapter to notify or consult with the governing body of an affected Indian tribe where a site is located, the Secretary shall also notify or consult with, as the case may be, the Governor of the State in which such reservation is located.

(Pub. L. 97-425, title I, § 116, Jan. 7, 1983, 96 Stat. 2220; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5032(a), Dec. 22, 1987, 101 Stat. 1330-241.)

AMENDMENTS

1987 - Subsec. (c). Pub. L. 100-202 and Pub. L. 100-203 generally amended subsec. (c) identically, substituting provisions consisting of pars. (1) to (6) for former provisions consisting of pars. (1) to (5).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10121, 10134, 10135, 10137, 10138, 10161, 10166, 10169, 10173a, 10222, 10243 of this title.

§ 10137. Consultation with States and affected Indian tribes

(a) Provision of information

(1) The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the Governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository.

(2) Upon written request for such information by the Governor or legislature of such State, or by the governing body of any affected Indian tribe, as the case may be, the Secretary shall provide a written response to such request within 30 days of the receipt of such request. Such response shall provide the information requested or, in the alternative, the reasons why the information cannot be so provided. If the Secretary fails to so respond within such 30 days, the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, may transmit a formal written objection to such failure to respond to the President. If the President or Secretary fails to respond to such written request within 30 days of the receipt by the President of such formal written objection, the Secretary shall immediately suspend all activities in such State authorized by this part, and shall not renew such activities until the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, has received the written response to such written request required by this subsection.

(b) Consultation and cooperation

In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading[4] any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an

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[4] So in original. Probably should be "locating".

effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

(c) Written agreement

Not later than 60 days after (1) the approval of a site for site characterization for such a repository under section 10132(c) of this title, or (2) the written request of the State or Indian tribe in any affected State notified under section 10136(a) of this title to the Secretary, whichever,[5] first occurs, the Secretary shall seek to enter into a binding written agreement, and shall begin negotiations, with such State and, where appropriate, to enter into a separate binding agreement with the governing body of any affected Indian tribe, setting forth (but not limited to) the procedures under which the requirements of subsections (a) and (b) of this section, and the provisions of such written agreement, shall be carried out. Any such written agreement shall not affect the authority of the Commission under existing law. Each such written agreement shall, to the maximum extent feasible, be completed not later than 6 months after such notification. If such written agreement is not completed within such period, the Secretary shall report to the Congress in writing within 30

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[5] So in original. The comma probably should not appear.

days on the status of negotiations to develop such agreement and the reasons why such agreement has not been completed. Prior to submission of such report to the Congress, the Secretary shall transmit such report to the Governor of such State or the governing body of such affected Indian tribe, as the case may be, for their review and comments. Such comments shall be included in such report prior to submission to the Congress. Such written agreement shall specify procedures –

(1) by which such State or governing body of an affected Indian tribe, as the case may be, may study, determine, comment on, and make recommendations with regard to the possible public health and safety, environmental, social, and economic impacts of any such repository;

(2) by which the Secretary shall consider and respond to comments and recommendations made by such State or governing body of an affected Indian tribe, including the period in which the Secretary shall so respond;

(3) by which the Secretary and such State or governing body of an affected Indian tribe may review or modify the agreement periodically;

(4) by which such State or governing body of an affected Indian tribe is to submit an impact report and request for impact assistance under section 10136(c) of this title or section 10138(b) of this title, as the case may be;

(5) by which the Secretary shall assist such State, and the units of general local government in the vicinity of the repository site, in resolving the offsite concerns of such State and units of general local government, including, but not

limited to, questions of State liability arising from accidents, necessary road upgrading and access to the site, ongoing emergency preparedness and emergency response, monitoring of transportation of high-level radioactive waste and spent nuclear fuel through such State, conduct of baseline health studies of inhabitants in neighboring communities near the repository site and reasonable periodic monitoring thereafter, and monitoring of the repository site upon any decommissioning and decontamination;

(6) by which the Secretary shall consult and cooperate with such State on a regular, ongoing basis and provide for an orderly process and timely schedule for State review and evaluation, including identification in the agreement of key events, milestones, and decision points in the activities of the Secretary at the potential repository site;

(7) by which the Secretary shall notify such State prior to the transportation of any high-level radioactive waste and spent nuclear fuel into such State for disposal at the repository site;

(8) by which such State may conduct reasonable independent monitoring and testing of activities on the repository site, except that such monitoring and testing shall not unreasonably interfere with or delay onsite activities;

(9) for sharing, in accordance with applicable law, of all technical and licensing information, the utilization of available expertise, the facilitating of permit procedures, joint project review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws;

(10) for public notification of the procedures specified under the preceding paragraphs; and

(11) for resolving objections of a State and affected Indian tribes at any stage of the planning, siting, development, construction, operation, or closure of such a facility within such State through negotiation, arbitration, or other appropriate mechanisms.

(d) On-site representative

The Secretary shall offer to any State, Indian tribe or unit of local government within whose jurisdiction a site for a repository or monitored retrievable storage facility is located under this subchapter an opportunity to designate a representative to conduct on-site oversight activities at such site. Reasonable expenses of such representatives shall be paid out of the Waste Fund.

(Pub. L. 97-425, title I, § 117, Jan. 7, 1983, 96 Stat. 2222; Pub. L. 100-202, § 101(d) [title III, § 300]. Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5011(m), Dec. 22, 1987, 101 Stat. 1330-231.)

AMENDMENTS

1987 – Subsec. (d). Pub. L. 100-202 and Pub. L. 100-203 amended section identically, adding subsec. (d).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10121, 10136, 10138, 10161, 10243 of this title.

§ 10138. Participation of Indian tribes

(a) Participation of Indian tribes in repository siting decisions

Upon the submission by the President to the Congress of a recommendation of a site for a repository located on the reservation of an affected Indian tribe, the governing body of such Indian tribe may disapprove the site designation and submit to the Congress a notice of disapproval. The governing body of such Indian tribe may submit such a notice of disapproval to the Congress not later than 60 days after the date that the President recommends such site to the Congress under section 10134 of this title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why the governing body of such Indian tribe disapproved the recommended repository site involved.

(b) Financial assistance

(1) The Secretary shall make grants to each affected tribe notified under section 10136(a) of this title for the purpose of participating in activities required by section 10137 of this title or authorized by written agreement entered into pursuant to section 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such tribe, may not be considered eligible for funding under this paragraph.

(2)(A) The Secretary shall make grants to each affected Indian tribe where a candidate site for a repository is approved under section 10132(c) of this title. Such grants may be made to each such Indian tribe only for purposes of enabling such Indian tribe –

(i) to review activities taken under this part with respect to such site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of such repository on the reservation and its residents;

(ii) to develop a request for impact assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to the residents of its reservation regarding any activities of such Indian tribe, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this part with respect to such site.

(B) The amount of funds provided to any affected Indian tribe under this paragraph in any fiscal year may not exceed 100 percent of the costs incurred by such Indian tribe with respect to the activities described in clauses (i) through (v) of subparagraph (A). Any salary or travel expense that would ordinarily be incurred by such Indian tribe may not be considered eligible for funding under this paragraph.

(3)(A) The Secretary shall provide financial and technical assistance to any affected Indian tribe requesting such assistance and where there is a site with respect to which the Commission has authorized construction of a repository. Such assistance shall be designed to mitigate the impact on such Indian tribe of the development of such repository. Such assistance to such Indian tribe shall commence within 6 months following the granting by the Commission of a construction authorization for such repository and following the initiation of construction activities at such site.

(B) Any affected Indian tribe desiring assistance under this paragraph shall prepare and submit to the Secretary a report on any economic, social, public health and safety, and environmental impacts that are likely as a result of the development of a repository at a site on the reservation of such Indian tribe. Such report shall be submitted to the Secretary following the completion of site characterization activities at such site and before the recommendation of such site to the President by the Secretary for application for a construction authorization for a repository. As soon as practicable following the granting of a construction authorization for such repository, the Secretary shall seek to enter into a binding agreement with the Indian tribe involved setting forth the amount of assistance to be provided to such Indian tribe under this paragraph and the procedures to be followed in providing such assistance.

(4) The Secretary shall grant to each affected Indian tribe where a site for a repository is approved under section 10132(c) of this title an amount each fiscal year equal to the amount such Indian tribe would receive were

it authorized to tax site characterization activities at such site, and the development and operation of such repository, as such Indian tribe taxes the other commercial activities occurring on such reservation. Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(5)[6] An affected Indian tribe may not receive any grant under paragraph (1) after the expiration of the 1-year period following –

(i) the date on which the Secretary notifies such Indian tribe of the termination of site characterization activities at the candidate site involved on the reservation of such Indian tribe;

(ii) the date on which such site is disapproved under section 10135 of this title;

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;[7]

(iv) December 22, 1987;

whichever occurs first, unless there is another candidate site on the reservation of such Indian tribe that is approved under section 10132(c) of this title and with respect to which the actions described in clauses (i), (ii), and (iii) have not been taken.

(B) An affected Indian tribe may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities at such site are

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[6] So in original. Probably should be designated "(5)(A)"

[7] So in original. Probably should be followed by "or".

terminated by the Secretary of if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a repository at a site on the reservation of an affected Indian tribe, no Federal funds shall be made available under paragraph (1) or (2) to such Indian tribe, except for –

(i) such funds as may be necessary to support activities of such Indian tribe related to any other repository where a license to receive and possess has not been in effect for more than 1 year; and

(ii) such funds as may be necessary to support activities of such Indian tribe pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such Indian tribe with the Secretary during such 2-year period.

(6) Financial assistance authorized in this subsection shall be made out of amounts held in the Nuclear Waste Fund established in section 10222 of this title.

(Pub. L. 97-425, title I, § 118, Jan. 7, 1983, 96 Stat. 2225; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5033, Dec. 22, 1987, 101 Stat. 1330-243.)

AMENDMENTS

1987 – Subsec. (b)(5)(iv). Pub. L. 100-202 and Pub. L. 100-203 amended par. (5) identically, adding cl. (iv).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10121, 10135, 10137, 10161, 10166, 10169, 10173(a), 101222, 10242 of this title.

§ 10139. Judicial review of agency actions

(a) Jurisdiction of United States courts of appeals

(1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action –

(A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;

(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;

(C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this part, or as required under section 10155(c)(1) of this title, or alleging a failure to prepare such statement with respect to any such action;

(E) for review of any environmental assessment prepared under section 10132(b)(1) or 10155(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

(2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

(c)[8] Deadline for commencing action

A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

(Pub. L. 97-425, title I, § 119, Jan. 7, 1983, 96 Stat. 2227.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a)(1)(D), is Pub. L. 91-190, Jan. 1,

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[8] So in original. Section enacted without a subsec. (b).

1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10132, 10145, 10155, 10201, 10244 of this title.

§ 10140. Expedited authorizations

(a) Issuance of authorizations

(1) To the extent that the taking of any action related to the site characterization of a site or the construction or initial operation of a repository under this part requires a certificate, right-of-way, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer. All actions of a Federal agency or officer with respect to consideration of applications or requests for the issuance or grant of any such authorization shall be expedited, and any such application or request shall take precedence over any similar applications or requests not related to such repositories.

(2) The provisions of paragraph (1) shall not apply to any certificate, right-of-way, permit, lease, or other authorization issued or granted by, or requested from, the Commission.

(b) Terms of authorizations

Any authorization issued or granted pursuant to subsection (a) of this section shall include such terms and conditions as may be required by law, and may include terms and conditions permitted by law.

(Pub. L. 97-425, title I, § 120, Jan. 7, 1983, 96 Stat. 2227.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10145 of this title.

§ 10141. Certain standards and criteria

(a) Environmental Protection Agency standards

Not later than 1 year after January 7, 1984, the Administrator, pursuant to authority under other provisions of law, shall, by rule promulgated generally applicable standards for protection of the general environment from offsite releases from radioactive material in repositories.

(b) Commission requirements and criteria

(1)(A) Not later than January 1, 1984, the Commission, pursuant to authority under other provisions of law, shall, by rule, promulgate technical requirements and criteria that it will apply, under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) and the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.), in approving or disapproving –

(i) applications for authorization to construct repositories;

(ii) applications for licenses to receive and possess spent nuclear fuel and high-level radioactive waste in such repositories; and

(iii) applications for authorization for closure and decommissioning of such repositories.

(B) Such criteria shall provide for the use of a system of multiple barriers in the design of the repository and shall include such restrictions on the retrievability of the solidified high-level radioactive waste and spent fuel emplaced in the repository as the Commission deems appropriate.

(C) Such requirements and criteria shall not be inconsistent with any comparable standards promulgated by the Administrator under subsection (a) of this section.

(2) For purposes of this chapter, nothing in this section shall be construed to prohibit the Commission from promulgating requirements and criteria under paragraph (1) before the Administrator promulgates standards under subsection (a) of this section. If the Administrator promulgates standards under subsection (a) of this section after requirements and criteria are promulgated by the Commission under paragraph (1), such requirements and criteria shall be revised by the Commission if necessary to comply with paragraph (1)(C).

(c) Environmental impact statement

The promulgation of standards or criteria in accordance with the provisions of this section shall not require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental

Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(Pub. L. 97-425, title I, § 121, Jan. 7, 1983, 96 Stat. 2228.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in subsec. (b)(1)(A), is act Aug. 30, 1954, ch. 1073, 68 Stat. 921, as amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Energy Reorganization Act of 1974, referred to in subsec. (b)(1)(A), is Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233, as amended, which is classified principally to chapter 73 (§ 5801 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5801 of this title and Tables.

§ 10142. Disposal of spent nuclear fuel

Notwithstanding any other provision of this part, any repository constructed on a site approved under this part shall be designed and constructed to permit the retrieval of any spent nuclear fuel placed in such repository, during an appropriate period of operation of the facility, for any reason pertaining to the public health and safety, or the environment, or for the purpose of permitting the recovery of the economically valuable contents of such spent fuel. The Secretary shall specify the appropriate period of retrievability with respect to any repository at the time of design of such repository, and such aspect

of such repository shall be subject to approval or disapproval by the Commission as part of the construction authorization process under subsections (b) through (d) of section 10134 of this title.

(Pub. L. 97-425, title I, § 122, Jan. 7, 1983, 96 Stat. 2228.)

§ 10143. Title to material

Delivery and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this part shall constitute a transfer to the Secretary of title to such waste or spent fuel.

(Pub. L. 97-425, title I, § 123, Jan. 7, 1983, 96 Stat. 2229.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10222 of this title.

§ 10144. Consideration of effect of acquisition of water rights

The Secretary shall give full consideration to whether the development, construction, and operation of a repository may require any purchase or other acquisition of water rights that will have a significant adverse effect on the present or future development of the area in which such repository is located. The Secretary shall mitigate any such adverse effects to the maximum extent practicable.

(Pub. L. 97-425, title I, § 124, Jan. 7, 1983, 96 Stat. 2229.)

§ 10145. Termination of certain provisions

Sections 10139 and 10140 of this title shall cease to have effect at such time as a repository developed under this part is licensed to receive and possess high-level radioactive waste and spent nuclear fuel.

(Pub. L. 97-425, title I, § 125, Jan. 7, 1983, 96 Stat. 2229.)

PART B – INTERIM STORAGE PROGRAM

§ 10151. Findings and purposes

(a) The Congress finds that –

(1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical;

(2) the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor; and

(3) the Federal Government has the responsibility to provide, in accordance with the provisions of this part, not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors when

needed to assure the continued, orderly operation of such reactors.

(b) The purposes of this part are –

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor; and

(2) to provide, in accordance with the provisions of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

(Pub. L. 97-425, title I, § 131, Jan. 7, 1983, 96 Stat. 2229.)

§ 10152. Available capacity for interim storage of spent nuclear fuel

The Secretary, the Commission, and other authorized Federal officials shall each take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor consistent with-

(1) the protection of the public health and safety, and the environment;

(2) economic considerations;

(3) continued operation of such reactor;

(4) any applicable provisions of law; and

(5) the views of the population surrounding such reactor.

(Pub. L. 97-425, title I, § 132, Jan. 7, 1983, 96 Stat. 2230.)

§ 10153. Interim at-reactor storage

The Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under section 10198(a)[1] of this title for use at the site of any civilian nuclear power reactor. The establishment of such procedures shall not preclude the licensing, under any applicable procedures or rules of the Commission in effect prior to such establishment, of any technology for the storage of civilian spent nuclear fuel at the site of any civilian nuclear power reactor.

(Pub. L. 97-425, title I, § 133, Jan. 7, 1983, 96 Stat. 2230.)

REFERENCES IN TEXT

Section 10198(a) of this title, referred to in text, was in the original a reference to section 219(a) of Pub. L. 97-425, which is classified to section 10199(a) of this title, and has been translated as section 10198(a) of this title as the probable intent of Congress in view of the subject matter of section 10198(a) which relates to development of technologies for storage of spent nuclear fuel, and the

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[1] See References in Text note below.

subject matter of section 10199(a) which relates to payments to States and Indian tribes.

§ 10154. Licensing of facility expansions and transshipments

(a) Oral argument

In any Commission hearing under section 189 of the Atomic Energy Act of 1954 (42 U.S.C. 2239) on an application for a license, or for an amendment to an existing license, filed after January 7, 1983, to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor, through the use of high-density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means, the Commission shall, at the request of any party, provide an opportunity for oral argument with respect to any matter which the Commission determines to be in controversy among the parties. The oral argument shall be preceded by such discovery procedures as the rules of the Commission shall provide. The Commission shall require each party, including the Commission staff, to submit in written form, at the time of the oral argument, a summary of the facts, data, and arguments upon which such party proposes to rely that are known at such time to such party. Only facts and data in the form of sworn testimony or written submission may be relied upon by the parties during oral argument. Of the materials that may be submitted by the parties

during oral argument, the Commission shall only consider those facts and data that are submitted in the form of sworn testimony or written submission.

(b) Adjudicatory hearing

(1) At the conclusion of any oral argument under subsection (a) of this section, the Commission shall designate any disputed question of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that –

(A) there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and

(B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.

(2) In making a determination under this subsection, the Commission –

(A) shall designate in writing the specific facts that are in genuine and substantial dispute, the reason why the decision of the agency is likely to depend on the resolution of such facts, and the reason why an adjudicatory hearing is likely to resolve the dispute; and

(B) shall not consider –

(i) any issue relating to the design, construction, or operation of any civilian nuclear power reactor already licensed to operate at such site, or any civilian nuclear power reactor for which a construction permit has been granted at such site, unless the

Commission determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered; or

(ii) any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at such site, unless (I) such issue results from any revision of siting or design criteria by the Commission following such decision; and (II) the Commission determines that such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered.

(3) The provisions of paragraph (2)(B) shall apply only with respect to licenses, authorizations, or amendments to licenses or authorizations, applied for under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) before December 31, 2005.

(4) The provisions of this section shall not apply to the first application for a license or license amendment received by the Commission to expand onsite spent fuel storage capacity by the use of a new technology not previously approved for use at any nuclear powerplant by the Commission.

(c) Judicial review

No court shall hold unlawful or set aside a decision of the Commission in any proceeding described in subsection (a) of this section because of a failure by the Commission to use a particular procedure pursuant to this section unless –

(1) an objection to the procedure used was presented to the Commission in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection; and

(2) the court finds that such failure has precluded a fair consideration and informed resolution of a significant issue of the proceeding taken as a whole.

(Pub. L. 97-425, title I, § 134, Jan. 7, 1983, 96 Stat. 2230.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in subsec. (b)(3), is act Aug. 30, 1954, ch. 1073, 68 Stat. 921, as amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

§ 10155. Storage of spent nuclear fuel

(a) Storage capacity

(1) Subject to section 10107 of this title, the Secretary shall provide, in accordance with paragraph (5), not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel from civilian nuclear power reactors.

Such storage capacity shall be provided through any one or more of the following methods, used in any combination determined by the Secretary to be appropriate:

(A) use of available capacity at one or more facilities owned by the Federal Government on January 7, 1983, including the modification and expansion of any such facilities, if the Commission determines that such use will adequately protect the public health and safety, except that such use shall not –

(i) render such facilities subject to licensing under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) or the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.); or

(ii) except as provided in subsection (c) of this section require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), such facility is already being used, or has previously been used, for such storage or for any similar purpose.

(B) acquisition of any modular or mobile spent nuclear fuel storage equipment, including spent nuclear fuel storage casks, and provision of such equipment, to any person generating or holding title to spent nuclear fuel, at the site of any civilian nuclear power reactor operated by such person or at any site owned by the Federal Government on January 7, 1983;

(C) construction of storage capacity at any site of a civilian nuclear power reactor.

(2) Storage capacity authorized by paragraph (1) shall not be provided at any Federal or non-Federal site within which there is a candidate site for a repository. The restriction in the preceding sentence shall only apply until such time as the Secretary decides that such candidate site is no longer a candidate site under consideration for development as a repository.

(3) In selecting methods of providing storage capacity under paragraph (1), the Secretary shall consider the timeliness of the availability of each such method and shall seek to minimize the transporation of spent nuclear fuel, the public health and safety impacts, and the costs of providing such storage capacity.

(4) In providing storage capacity through any method described in paragraph (1), the Secretary shall comply with any applicable requirements for licensing or authorization of such method, except as provided in paragraph (1)(A)(i).

(5) The Secretary shall ensure that storage capacity is made available under paragraph (1) when needed, as determined on the basis of the storage needs specified in contracts entered into under section 10156(a) of this title, and shall accept upon request any spent nuclear fuel as covered under such contracts.

(6) For purposes of paragraph (1)(A), the term "facility" means any building or structure.

(b) Contracts

(1) Subject to the capacity limitation established in subsections (a)(1) and (d) of this section, the Secretary

shall offer to enter into, and may enter into, contracts under section 10156(a) of this title with any person generating or owning spent nuclear fuel for purposes of providing storage capacity for such spent fuel under this section only if the Commission determines that –

(A) adequate storage capacity to ensure the continued orderly operation of the civilian nuclear power reactor at which such spent nuclear fuel is generated cannot reasonably be provided by the person owning and operating such reactor at such site, or at the site of any other civilian nuclear power reactor operated by such person, and such capacity cannot be made available in a timely manner through any method described in subparagraph (B); and

(B) such person is diligently pursuing licensed alternatives to the use of Federal storage capacity for the storage of spent nuclear fuel expected to be generated by such person in the future, including –

(i) expansion of storage facilities at the site of any civilian nuclear power reactor operated by such person;

(ii) construction of new or additional storage facilities at the site of any civilian nuclear power reactor operated by such person;

(iii) acquisition of modular or mobile spent nuclear fuel storage equipment, including spent nuclear fuel storage casks, for use at the site of any civilian nuclear power reactor operated by such person; and

(iv) transshipment to another civilian nuclear power reactor owned by such person.

(2) In making the determination described in paragraph (1)(A), the Commission shall ensure maintenance of a full core reserve storage capability at the site of the civilian nuclear power reactor involved unless the Commission determines that maintenance of such capability is not necessary for the continued orderly operation of such reactor.

(3) The Commission shall complete the determinations required in paragraph (1) with respect to any request for storage capacity not later than 6 months after receipt of such request by the Commission.

(c) Environmental review

(1) The provision of 300 or more metric tons of storage capacity at any one Federal site under subsection (a)(1)(A) of this section shall be considered to be a major Federal action requiring preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

(2)(A) The Secretary shall prepare, and make available to the public, an environmental assessment of the probable impacts of any provision of less than 300 metric tons of storage capacity at any one Federal site under subsection (a)(1)(A) of this section that requires the modification or expansion of any facility at the site, and a discussion of alternative activities that may be undertaken to avoid such impacts. Such environmental assessment shall include –

(i) an estimate of the amount of storage capacity to be made available at such site;

(ii) an evaluation as to whether the facilities to be used at such site are suitable for the provision of such storage capacity;

(iii) a description of activities planned by the Secretary with respect to the modification or expansion of the facilities to be used at such site;

(iv) an evaluation of the effects of the provision of such storage capacity at such site on the public health and safety, and the environment;

(v) a reasonable comparative evaluation of current information with respect to such site and facilities and other sites and facilities available for the provision of such storage capacity;

(vi) a description of any other sites and facilitaties that have been considered by the Secretary for the provision of such storage capacity; and

(vii) an assessment of the regional and local impacts of providing such storage capacity at such site, including the impacts on transportation.

(B) The issuance of any environmental assessment under this paragraph shall be considered to be a final agency action subject to judicial review in accordance with the provisions of chapter 7 of title 5. Such judicial review shall be limited to the sufficiency of such assessment with respect to the items described in clauses (i) through (vii) of subparagraph (A).

(3) Judicial review of any environmental impact statement or environmental assessment prepared pursuant to this subsection shall be conducted in accordance with the provisions of section 10139 of this title.

(d) Review of sites and State participation

(1) In carrying out the provisions of this part with regard to any interim storage of spent fuel from civilian nuclear power reactors which the Secretary is authorized by this section to provide, the Secretary shall, as soon as practicable, notify, in writing, the Governor and the State legislature of any State and the Tribal Council of any affected Indian tribe in such State in which is located a potentially acceptable site or facility for such interim storage of spent fuel of his intention to investigate that site or facility.

(2) During the course of investigation of such site or facility, the Secretary shall keep the Governor, State legislature, and affected Tribal Council currently informed of the progress of the work, and results of the investigation. At the time of selection by the Secretary of any site or existing facility, but prior to undertaking any site-specific work or alterations, the Secretary shall promptly notify the Governor, the legislature, and any affected Tribal Council in writing of such selection, and subject to the provisions of paragraph (6) of this subsection, shall promptly enter into negotiations with such State and affected Tribal Council to establish a cooperative agreement under which such State and Council shall have the

right to participate in a process of consultation and cooperation, based on public health and safety and environmental concerns, in all stages of the planning, development, modification, expansion, operation, and closure of storage capacity at a site or facility within such State for the interim storage of spent fuel from civilian nuclear power reactors. Public participation in the negotiation of such an agreement shall be provided for and encouraged by the Secretary, the State, and the affected Tribal Council. The Secretary, in cooperation with the States and Indian tribes, shall develop and publish minimum guidelines for public participation in such negotiations, but the adequacy of such guidelines or any failure to comply with such guidelines shall not be a basis for judicial review.

(3) The cooperative agreement shall include, but need not be limited to, the sharing in accordance with applicable law of all technical and licensing information, the utilization of available expertise, the facilitating of permitting procedures, joint project review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws. The cooperative agreement also shall include a detailed plan or schedule of milestones, decisions points and opportunities for State or eligible Tribal Council review and objection. Such cooperative agreement shall provide procedures for negotiating and resolving objections of the State and affected Tribal Council in any stage of planning, development, modification, expansion, operation, or closure of storage capacity at a site or facility within such State. The terms of any cooperative agreement shall not

affect the authority of the Nuclear Regulatory Commission under existing law.

(4) For the purpose of this subsection, "process of consultation and cooperation" means a methodology by which the Secretary (A) keeps the State and eligible Tribal Council fully and currently informed about the aspects of the project related to any potential impact on the public health and safety and environment; (B) solicits, receives, and evaluates concerns and objections of such State and Council with regard to such aspects of the project on an ongoing basis; and (C) works diligently and cooperatively to resolve, through arbitration or other appropriate mechanisms, such concerns and objections. The process of consultation and cooperation shall not include the grant of a right to any State or Tribal Council to exercise an absolute veto of any aspect of the planning, development, modification, expansion, or operation of the project.

(5) The Secretary and the State and affected Tribal Council shall seek to conclude the agreement required by paragraph (2) as soon as practicable, but not later than 180 days following the date of notification of the selection under paragraph (2). The Secretary shall periodically report to the Congress thereafter on the status of the agreements approved under paragraph (3). Any report to the Congress on the status of negotiations of such agreement by the Secretary shall be accompanied by comments solicited by the Secretary from the State and eligible Tribal Council.

(6)(A) Upon deciding to provide an aggregate of 300 or more metric tons of storage capacity under subsection (a)(1) of this section at any one site, the Secretary shall notify the Governor and legislature of the State where such site is located, or the governing body of the Indian tribe in whose reservation such site is located, as the case may be, of such decision. During the 60-day period following receipt of notification by the Secretary of his decision to provide an aggregate of 300 or more metric tons of storage capacity at any one site, the Governor or legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, may disapprove the provision of 300 or more metric tons of storage capacity at the site involved and submit to the Congress a notice of such disapproval. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why the provision of such storage capacity at such site was disapproved by such Governor or legislature or the governing body of such Indian tribe.

(B) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under subparagraph (A). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this part to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(C) The authority of the Governor and legislature of each State under this paragraph shall not be applicable with respect to any site located on a reservation.

(D) If any notice of disapproval is submitted to the Congress under subparagraph (A), the proposed provision of 300 or more metric tons of storage capacity at the site involved shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress following the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution approving such proposed provision of storage capacity in accordance with the procedures established in this paragraph and subsections (d) through (f) of section 10135 of this title and such resolution thereafter becomes law. For purposes of this paragraph, the term "resolution" means a joint resolution of either House of the Congress, the matter after the resolving clause of which is as follows: "That there hereby is approved the provision of 300 or more metric tons of spent nuclear fuel storage capacity at the site located at ___, with respect to which a notice of disapproval was submitted by ___ on ___.". The first blank space in such resolution shall be filled with the geographic location of the site involved; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or affected Indian tribe governing body submitting the notice of disapproval involved; and the last blank space in such resolution shall be filled with the date of submission of such notice of disapproval.

(E) For purposes of the consideration of any resolution described in subparagraph (D), each reference in subsections (d) and (e) of section 10135 of this title to a

resolution of repository siting approval shall be considered to refer to the resolution described in such subparagraph.

(7) As used in this section, the term "affected Tribal Council" means the governing body of any Indian tribe within whose reservation boundaries there is located a potentially acceptable site for interim storage capacity of spent nuclear fuel from civilian nuclear power reactors, or within whose boundaries a site for such capacity is selected by the Secretary, or whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties, as determined by the Secretary of the Interior pursuant to a petition filed with him by the appropriate governmental officials of such tribe, may be substantially and adversely affected by the establishment of any such storage capacity.

(e) Limitations

Any spent nuclear fuel stored under this section shall be removed from the storage site or facility involved as soon as practicable, but in any event not later than 3 years following the date on which a repository or monitored retrievable storage facility developed under this chapter is available for disposal of such spent nuclear fuel.

(f) Report

The Secretary shall annually prepare and submit to the Congress a report on any plans of the Secretary for

providing storage capacity under this section. Such report shall include a description of the specific manner of providing such storage selected by the Secretary, if any. The Secretary shall prepare and submit the first such report not later than 1 year after January 7, 1983.

(g) Criteria for determining adequacy of available storage capacity

Not later than 90 days after January 7, 1983, the Commission pursuant to section 553 of the Administrative Procedures Act [5 U.S.C. 553], shall propose, by rule, procedures and criteria for making the determination required by subsection (b) of this section that a person owning and operating a civilian nuclear power reactor cannot reasonably provide adequate spent nuclear fuel storage capacity at the civilian nuclear power reactor site when needed to ensure the continued orderly operation of such reactor. Such criteria shall ensure the maintenance of a full core reserve storage capability at the site of such reactor unless the Commission determines that maintenance of such capability is not necessary for the continued orderly operation of such reactor. Such criteria shall identify the feasibility of reasonably providing such adequate spent nuclear fuel storage capacity, taking into account economic, technical, regulatory, and public health and safety factors, through the use of high-density fuel storage racks, fuel rod compaction, transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, construction of additional spent nuclear fuel pool capacity, or such other technologies as may be approved by the Commission.

(h) Application

Notwithstanding any other provision of law, nothing in this chapter shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on January 7, 1983.

(i) Coordination with research and development program

To the extent available, and consistent with the provisions of this section, the Secretary shall provide spent nuclear fuel for the research and development program authorized in section 10198[2] of this title from spent nuclear fuel received by the Secretary for storage under this section. Such spent nuclear fuel shall not be subject to the provisions of subsection (e) of this section.

(Pub. L. 97-425, title I, § 135, Jan. 7, 1983, 96 Stat. 2232.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in subsec. (a)(1)(A)(i), is act Aug. 30, 1954, ch. 1073, 68 Stat. 921, as amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

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[2] See References in Text note below.

The Energy Reorganization Act of 1974, referred to in subsec. (a)(1)(A)(i), is Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233, as amended, which is classified principally to chapter 73 § 5801 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5801 of this title and Tables.

Section 10198 of this title, referred to in subsec. (i), was in the original a reference to section 217 of Pub. L. 97-425, which is classified to section 10197 of this title, and has been translated as section 10198 of this title as the probable intent of Congress in view of section 10198(c)(2) which directs the Secretary to provide spent nuclear fuel for the research and development program authorized by section 10198(c) of this title from spent nuclear fuel received by the Secretary for storage under section 10155 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10139, 10156, 10198 of this title.

§ 10156. Interim Storage Fund

(a) Contracts

(1) During the period following January 7, 1983, but not later than January 1, 1990, the Secretary is authorized to enter into contracts with persons who generate or own spent nuclear fuel resulting from civilian nuclear activities for the storage of such spent nuclear fuel in any storage capacity provided under this part: *Provided, however,* That the Secretary shall not enter into contracts for spent nuclear fuel in amounts in excess of the available storage capacity specified in section 10155(a) of this title.

Those contracts shall provide that the Federal Government will (1) take title at the civilian nuclear power reactor site, to such amounts of spent nuclear fuel from the civilian nuclear power reactor as the Commission determines cannot be stored onsite, (2) transport the spent nuclear fuel to a federally owned and operated interim away-from-reactor storage facility, and (3) store such fuel in the facility pending further processing, storage, or disposal. Each such contract shall (A) provide for payment to the Secretary of fees determined in accordance with the provisions of this section; and (B) specify the amount of storage capacity to be provided for the person involved.

(2) The Secretary shall undertake a study and, not later than 180 days after January 7, 1983, submit to the Congress a report, establishing payment charges that shall be calculated on an annual basis, commencing on or before January 1, 1984. Such payment charges and the calculation thereof shall be published in the Federal Register, and shall become effective not less than 30 days after publication. Each payment charge published in the Federal Register under this paragraph shall remain effective for a period of 12 months from the effective date as the charge for the cost of the interim storage of any spent nuclear fuel. The report of the Secretary shall specify the method and manner of collection (including the rates and manner of payment) and any legislative recommendations determined by the Secretary to be appropriate.

(3) Fees for storage under this part shall be established on a nondiscriminatory basis. The fees to be paid by each person entering into a contract with the Secretary under this subsection shall be based upon an estimate of

the pro rata costs of storage and related activities under this part with respect to such person, including the acquisition, construction, operation, and maintenance of any facilities under this part.

(4) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such storage services shall be made available.

(5) Except as provided in section 10157 of this title, nothing in this chapter or any other Act requires the Secretary, in carrying out the responsibilities of this section, to obtain a license or permit to possess or own spent nuclear fuel.

(b) Limitation

No spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of title 5 may be stored by the Secretary in any storage capacity provided under this part unless such department transfers to the Secretary, for deposit in the Interim Storage Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such spent nuclear fuel were generated by any other person.

(c) Establishment of Interim Storage Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Interim Storage Fund. The Storage Fund shall consist of –

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a),

(b), and (e) of this section, which shall be deposited in the Storage Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Storage Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the interim storage of civilian spent nuclear fuel, which shall automatically be transferred to the Storage Fund on such date.

(d) Use of Storage Fund

The Secretary may make expenditures from the Storage Fund, subject to subsection (e) of this section, for any purpose necessary or appropriate to the conduct of the functions and activities of the Secretary, or the provision or anticipated provision of services, under this part, including –

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any interim storage facility provided under this part;

(2) the administrative cost of the interim storage program;

(3) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at an interim storage site, consistent with the restrictions in section 10155 of this title;

(4) the cost of transportation of spent nuclear fuel; and

(5) impact assistance as described in subsection (e) of this section.

(e) Impact assistance

(1) Beginning the first fiscal year which commences after January 7, 1983, the Secretary shall make annual impact assistance payments to a State or appropriate unit of local government, or both, in order to mitigate social or economic impacts occasioned by the establishment and subsequent operation of any interim storage capacity within the jurisdicational[3] boundaries of such government or governments and authorized under this part: *Provided, however,* That such impact assistance payments shall not exceed (A) ten per centum of the costs incurred in paragraphs (1) and (2), or (B) $15 per kilogram of spent fuel, whichever is less;

(2) Payments made available to States and units of local government pursuant to this section shall be –

(A) allocated in a fair and equitable manner with a priority to those States or units of local government suffering the most severe impacts; and

(B) utilized by States or units of local governments only for (i) planning, (ii) construction and maintenance of public services, (iii) provision of public services related to the providing of such interim storage authorized under this subchapter, and (iv) compensation for loss of taxable property equivalent to that if the storage had been provided under private ownership.

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[3] So in original. Probably should be "jurisdictional".

(3) Such payments shall be subject to such terms and conditions as the Secretary determines necessary to ensure that the purposes of this subsection shall be achieved. The Secretary shall issue such regulations as may be necessary to carry out the provisions of this subsection.

(4) Payments under this subsection shall be made available solely from the fees determined under subsection (a) of this section.

(5) The Secretary is authorized to consult with States and appropriate units of local government in advance of commencement of establishment of storage capacity authorized under this part in an effort to determine the level of the payment such government would be eligible to receive pursuant to this subsection.

(6) As used in this subsection, the term "unit of local government" means a county, parish, township, municipality, and shall include a borough existing in the State of Alaska on January 7, 1983, and any other unit of government below the State level which is a unit of general government as determined by the Secretary.

(f) Administration of Storage Fund

(1) The Secretary of the Treasury shall hold the Storage Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Storage Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Storage Fund to the Office of Management and Budget

triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of title 31. The budget of the Storage Fund shall consist of estimates made by the Secretary of expenditures from the Storage Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Storage Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Storage Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States –

> (A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Storage Fund; and
>
> (B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of

amounts from the Storage Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of title 31.

(5) If at any time the moneys available in the Storage Fund are insufficient to enable the Secretary to discharge his responsibilities under this part, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Storage Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such Act[4] are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of

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[4] See References in Text note below.

obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Storage Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Storage fund, less the average undisbursed cash balance in the Storage Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of Comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

(Pub. L. 97-425, title I, § 136, Jan. 7, 1983, 96 Stat. 2237.)

References in Text

Such Act, referred to in subsec. (f)(5), probably means chapter 31 of Title 31, Money and Finance.

Section Referred to in Other Sections

This section is referred to in sections 10101, 10155, 10157, 10198 of this title.

§ 10157. Transportation

(a)(1)[5] Transportation of spent nuclear fuel under section 10156(a) of this title shall be subject to licensing and regulation by the Commission and by the Secretary of Transportation as provided for transportation of commercial spent nuclear fuel under existing law.

(2) The Secretary, in providing for the transportation of spent nuclear fuel under this chapter, shall utilize by contract private industry to the fullest extent possible in each aspect of such transportation. The Secretary shall use direct Federal services for such transportation only upon a determination of the Secretary of Transportation, in consultation with the Secretary, that private industry is unable or unwilling to provide such transportation services at reasonable cost.

(Pub. L. 97-425, title I, § 137, Jan. 7, 1983, 96 Stat. 2241.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10156 of this title.

PART C – MONITORED RETRIEVABLE STORAGE
PART REFERRED TO IN OTHER SECTIONS

This part is referred to in sections 10134, 10175 of this title.

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[5] So in original Section enacted without a subsec. (b)

§ 10161. Monitored retrievable storage

(a) Findings

The Congress finds that –

(1) long-term storage of high-level radioactive waste or spent nuclear fuel in monitored retrievable storage facilities is an option for providing safe and reliable management of such waste or spent fuel;

(2) the executive branch and the Congress should proceed as expeditiously as possible to consider fully a proposal for construction of one or more monitored retrievable storage facilities to provide such long-term storage;

(3) the Federal Government has the responsibility to ensure that site-specific designs for such facilities are available as provided in this section;

(4) the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities have the responsibility to pay the costs of the long-term storage of such waste and spent fuel; and

(5) disposal of high-level radioactive waste and spent nuclear fuel in a repository developed under this chapter should proceed regardless of any construction of a monitored retrievable storage facility pursuant to this section.

(b) Submission of proposal by Secretary

(1) On or before June 1, 1985, the Secretary shall complete a detailed study of the need for and feasibility

of, and shall submit to the Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level radioactive waste and spent nuclear fuel. Each such facility shall be designed –

(A) to accommodate spent nuclear fuel and high-level radioactive waste resulting from civilian nuclear activities;

(B) to permit continuous monitoring, management, and maintenance of such spent fuel and waste for the foreseeable future;

(C) to provide for the ready retrieval of such spent fuel and waste for further processing or disposal; and

(D) to safely store such spent fuel and waste as long as may be necessary by maintaining such facility through appropriate means, including any required replacement of such facility.

(2) Such proposal shall include –

(A) the establishment of a Federal program for the siting, development, construction, and operation of facilities capable of safely storing high-level radioactive waste and spent nuclear fuel, which facilities are to be licensed by the Commission;

(B) a plan for the funding of the construction and operation of such facilities, which plan shall provide that the costs of such activities shall be borne by the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities;

(C) site-specific designs, specifications, and cost estimates sufficient to (i) solicit bids for

the construction of the first such facility; (ii) support congressional authorization of the construction of such facility; and (iii) enable completion and operation of such facility as soon as practicable following congressional authorization of such facility; and

(D) a plan for integrating facilities constructed pursuant to this section with other storage and disposal facilities authorized in this chapter.

(3) In formulating such proposal, the Secretary shall consult with the Commission and the Administrator, and shall submit their comments on such proposal to the Congress at the time such proposal is submitted.

(4) The proposal shall include, for the first such facility, at least 3 alternative sites and at least 5 alternative combinations of such proposed sites and facility designs consistent with the criteria of paragraph (1). The Secretary shall recommend the combination among the alternatives that the Secretary deems preferable. The environmental assessment under subsection (c) of this section shall include a full analysis of the relative advantages and disadvantages of all 5 such alternative combinations of proposed sites and proposed facility designs.

(c) Environmental impact statements

(1) Preparation and submission to the Congress of the proposal required in this section shall not require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Secretary shall prepare, in accordance with regulations issued by the

Secretary implementing such Act [42 U.S.C. 4321 et seq.], an environmental assessment with respect to such proposal. Such environmental assessment shall be based upon available information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste. The Secretary shall submit such environmental assessment to the Congress at the time such proposal is submitted.

(2) If the Congress by law, after review of the proposal submitted by the Secretary under subsection (b) of this section, specifically authorizes construction of a monitored retrievable storage facility, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply with respect to construction of such facility, except that any environmental impact statement prepared with respect to such facility shall not be required to consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1) of this section.

(d) Licensing

Any facility authorized pursuant to this section shall be subject to licensing under section 5842(3) of this title. In reviewing the application filed by the Secretary for licensing of the first such facility, the Commission may not consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1) of this section.

(e) Clarification

Nothing in this section limits the consideration of alternative facility designs consistent with the criteria of subsection (b)(1) of this section in any environmental impact statement, or in any licensing procedure of the Commission, with respect to any monitored, retrievable facility authorized pursuant to this section.

(f) Impact assistance

(1) Upon receipt by the Secretary of congressional authorization to construct a facility described in subsection (b) of this section, the Secretary shall commence making annual impact aid payments to appropriate units of general local government in order to mitigate any social or economic impacts resulting from the construction and subsequent operation of any such facility within the jurisdictional boundaries of any such unit.

(2) Payments made available to units of general local government under this subsection shall be –

(A) allocated in a fair and equitable manner, with priority given to units of general local government determined by the Secretary to be most severely affected; and

(B) utilized by units of general local government only for planning, construction, maintenance, and provision of public services related to the siting of such facility.

(3) Such payments shall be subject to such terms and conditions as the Secretary determines are necessary to ensure achievement of the purposes of this subsection.

The Secretary shall issue such regulations as may be necessary to carry out the provisions of this subsection.

(4) Such payments shall be made available entirely from funds held in the Nuclear Waste Fund established in section 10222(c) of this title and shall be available only to the extent provided in advance in appropriation Acts.

(5) The Secretary may consult with appropriate units of general local government in advance of commencement of construction of any such facility in an effort to determine the level of payments each such unit is eligible to receive under this subsection.

(g) Limitation

No monitored retrievable storage facility developed pursuant to this section may be constructed in any State in which there is located any site approved for site characterization under section 10132 of this title. The restriction in the preceding sentence shall only apply until such time as the Secretary decides that such candidate site is no longer a candidate site under consideration for development as a repository. Such restriction shall continue to apply to any site selected for construction as a repository.

(h) Participation of States and Indian tribes

Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this

title to a repository shall be considered to refer to a monitored retrievable storage facility.

(Pub. L. 97-425, title I, § 141, Jan. 7, 1983, 96 Stat. 2241.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (c), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10101, 10168, 10200 of this title.

§ 10162. Authorization of monitored retrievable storage

(a) Nullification of Oak Ridge siting proposal

The proposal of the Secretary (EC-1022, 100th Congress) to locate a monitored retrievable storage facility at a site on the Clinch River in the Roane County portion of Oak Ridge, Tennessee, with alternative sites on the Oak Ridge Reservation of the Department of Energy and on the former site of a proposed nuclear powerplant in Hartsville. Tennessee, is annulled and revoked. In carrying out the provisions of sections 10164 and 10165 of this title, the Secretary shall make no presumption or preference to such sites by reason of their previous selection.

(b) Authorization

The Secretary is authorized to site, construct, and operate one monitored retrievable storage facility subject to the conditions described in sections 10163 through 10169 of this title.

(Pub. L. 97-425, title I, § 142, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5021, Dec. 22, 1987, 101 Stat. 1330-232.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10165, 10168 of this title.

§ 10163. Monitored Retrievable Storage Commission

(a)[1] Establishment

(1)(A) There is established a Monitored Retrievable Storage Review Commission thereinafter in this section referred to as the "MRS Commission"), that shall consist of 3 members who shall be appointed by and serve at the pleasure of the President pro tempore of the Senate and the Speaker of the House of Representatives.

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[1] So in original. Section enacted without a subsec. (b)

(B) Members of the MRS Commission shall be appointed not later than 30 days after December 22, 1987, from among persons who as a result of training, experience and attainments are exceptionally well qualified to evaluate the need for a monitored retrievable storage facility as a part of the Nation's nuclear waste management system.

(C) The MRS Commission shall prepare a report on the need for a monitored retrievable storage facility as a part of a national nuclear waste management system that achieves the purposes of this chapter. In preparing the report under this subparagraph, the MRS Commission shall –

(i) review the status and adequacy of the Secretary's evaluation of the systems advantages and disadvantages of bringing such a facility into the national nuclear waste disposal system;

(ii) obtain comment and available data on monitored retrievable storage from affected parties, including States containing potentially acceptable sites;

(iii) evaluate the utility of a monitored retrievable storage facility from a technical perspective; and

(iv) make a recommendation to Congress as to whether such a facility should be included in the national nuclear waste management system in order to achieve the purposes of this chapter, including meeting needs for packaging and handling of spent nuclear fuel, improving the flexibility of the repository development

schedule, and providing temporary storage of spent nuclear fuel accepted for disposal.

(2) In preparing the report and making its recommendation under paragraph (1) the MRS Commission shall compare such a facility to the alternative of at-reactor storage of spent nuclear fuel prior to disposal of such fuel in a repository under this chapter. Such comparison shall take into consideration the impact on –

(A) repository design and construction;

(B) waste package design, fabrication and standardization;

(C) waste preparation;

(D) waste transportation systems;

(E) the reliability of the national system for the disposal of radioactive waste;

(F) the ability of the Secretary to fulfill contractual commitments of the Department under this chapter to accept spent nuclear fuel for disposal; and

(G) economic factors, including the impact on the costs likely to be imposed on ratepayers of the Nation's electric utilities for temporary at-reactor storage of spent nuclear fuel prior to final disposal in a repository, as well as the costs likely to be imposed on ratepayers of the Nation's electric utilities in building and operating such a facility.

(3) The report under this subsection, together with the recommendation of the MRS Commission, shall be transmitted to Congress on November 1, 1989.

(4)(A)(i) Each member of the MRS Commission shall be paid at the rate provided for level III of the Executive Schedule for each day (including travel time) such member is engaged in the work of the MRS Commission, and shall receive travel expenses, including per diem in lieu of subsistence in the same manner as is permitted under sections 5702 and 5703 of title 5.

(ii) The MRS Commission may appoint and fix compensation, not to exceed the rate of basic pay payable for GS-18 of the General Schedule, for such staff as may be necessary to carry out its functions.

(B)(i) The MRS Commission may hold hearings, sit and act at such times and places, take such testimony and receive such evidence as the MRS Commission considers appropriate. Any member of the MRS Commission may administer oaths or affirmations to witnesses appearing before the MRS Commission.

(ii) The MRS Commission may request any Executive agency, including the Department, to furnish such assistance or information, including records, data, files, or documents, as the Commission considers necessary to carry out its functions. Unless prohibited by law, such agency shall promptly furnish such assistance or information.

(iii) To the extent permitted by law, the Administrator of the General Services Administration shall, upon request of the MRS Commission, provide the MRS Commission with necessary administrative services, facilities, and support on a reimbursable basis.

(iv) The MRS Commission may procure temporary and intermittent services from experts and consultants to the same extent as is authorized by section 3109(b) of title 5 at rates and under such rules as the MRS Commission considers reasonable.

(C) The MRS Commission shall cease to exist 60 days after the submission to Congress of the report required under this subsection.

(Pub. L. 97-425, title I, § 143, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5021, Dec. 22, 1987, 101 Stat. 1330-232; Pub. L. 100-507, § 2, Oct. 18, 1988, 102 Stat. 2541.)

REFERENCES IN TEXT

Level III of the Executive Schedule, referred to in subsec. (a)(4)(A)(i), is set out in section 5314 of Title 5, Government Organization and Employees.

The General Schedule, referred to in subsec. (a)(4)(A)(ii), is set out under section 5332 of Title 5.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

AMENDMENTS

1988 – Subsec. (a)(3). Pub. L. 100-507 amended par. (3) generally. Prior to amendment, par. (3) read as follows: "The report under this subsection, together with the recommendation of the MRS Commission, shall be transmitted to Congress on June 1, 1989."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10162, 10164 of this title.

§ 10164. Survey

After the MRS Commission submits its report to the Congress under section 10163 of this title, the Secretary may conduct a survey and evaluation of potentially suitable sites for a monitored retrievable storage facility. In conducting such survey and evaluation, the Secretary shall consider the extent to which siting a monitored retrievable storage facility at each site surveyed would –

(1) enhance the reliability and flexibility of the system for the disposal of spent nuclear fuel and high-level radioactive waste established under this chapter;

(2) minimize the impacts of transportation and handling of such fuel and waste;

(3) provide for public confidence in the ability of such system to safely dispose of the fuel and waste;

(4) impose minimal adverse effects on the local community and the local environment;

(5) provide a high probability that the facility will meet applicable environmental, health, and safety requirements in a timely fashion;

(6) provide such other benefits to the system for the disposal of spent nuclear fuel and high-level radioactive waste as the Secretary deems appropriate; and

(7) unduly burden a State in which significant volumes of high-level radioactive waste resulting from atomic energy defense activities are stored.

(Pub. L. 97-425, title I, § 144, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5021, Dec. 22, 1987, 101 Stat. 1330-234.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10162, 10165 of this title.

§ 10165. Site selection

(a) In general

The Secretary may select the site evaluated under section 10164 of this title that the Secretary determines on the basis of available information to be the most suitable for a monitored retrievable storage facility that is an integral part of the system for the disposal of spent nuclear fuel and high-level radioactive waste established under this chapter.

(b) Limitation

The Secretary may not select a site under subsection (a) of this section until the Secretary recommends to the

President the approval of a site for development as a repository under section 10134(a) of this title.

(c) Site specific activities

The Secretary may conduct such site specific activities at each site surveyed under section 10164 of this title as he determines may be necessary to support an application to the Commission for a license to construct a monitored retrievable storage facility at such site.

(d) Environmental assessment

Site specific activities and selection of a site under this section shall not reqüire the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Secretary shall prepare an environmental assessment with respect to such selection in accordance with regulations issued by the Secretary implementing such Act [42 U.S.C. 4321 et seq.]. Such environmental assessment shall be based upon available information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste. The Secretary shall submit such environmental assessment to the Congress at the time such site is selected.

(e) Notification before selection

(1) At least 6 months before selecting a site under subsection (a) of this section, the Secretary shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected

Indian tribe where such site is located, as the case may be, of such potential selection and the basis for such selection.

(2) Before selecting any site under subsection (a) of this section, the Secretary shall hold at least one public hearing in the vicinity of such site to solicit any recommendations of interested parties with respect to issues raised by the selection of such site.

(f) Notification of selection

The Secretary shall promptly notify Congress and the appropriate State or Indian tribe of the selection under subsection (a) of this section.

(g) Limitation

No monitored retrievable storage facility authorized pursuant to section 10162(b) of this title may be constructed in the State of Nevada.

(Pub. L. 97-425, title I, § 145, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5021, Dec. 22, 1987, 101 Stat. 1330-234.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (d), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10162, 10166, 10167 of this title.

§ 10166. Notice of disapproval

(a) In general

The selection of a site under section 10165 of this title shall be effective at the end of the period of 60 calendar days beginning on the date of notification under such subsection, unless the governing body of the Indian tribe on whose reservation such site is located, or, if the site is not on a reservation, the Governor and the legislature of the State in which the site is located, has submitted to Congress a notice of disapproval with respect to such site. If any such notice of disapproval has been submitted under this subsection, the selection of the site under section 10165 of this title shall not be effective except as provided under section 10135(c) of this title.

(b) References

For purposes of carrying out the provisions of this subsection, references in section 10135(c) of this title to a repository shall be considered to refer to a monitored retrievable storage facility and references to a notice of disapproval of a repository site designation under section

10136(b) or 10138(a) of this title shall be considered to refer to a notice of disapproval under this section.

(Pub. L. 97-425, title I, § 146, as added pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5021, Dec. 22, 1987, 101 Stat. 1330-235.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10162, 10168 of this title.

§ 10167. Benefits agreement

Once selection of a site for a monitored retrievable storage facility is made by the Secretary under section 10165 of this title, the Indian tribe on whose reservation the site is located, or, in the case that the site is not located on a reservation, the State in which the site is located, shall be eligible to enter into a benefits agreement with the Secretary under section 10173 of this title.

(Pub. L. 97-425, title I, § 147, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5021, Dec. 22, 1987, 101 Stat. 1330-235.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10162 of this title.

§ 10168. Construction authorization

(a) Environmental impact statement

(1) Once the selection of a site is effective under section 10166 of this title, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply with respect to construction of a monitored retrievable storage facility, except that any environmental impact statement prepared with respect to such facility shall not be required to consider the need for such facility or any alternative to the design criteria for such facility set forth in section 10161(b)(1) of this title.

(2) Nothing in this section shall be construed to limit the consideration of alternative facility designs consistent with the criteria described in section 10161(b)(1) of this title in any environmental impact statement, or in any licensing procedure of the Commission, with respect to any monitored retrievable storage facility authorized under section 10162(b) of this title.

(b) Application for construction license

Once the selection of a site for a monitored retrievable storage facility is effective under section 10166 of this title, the Secretary may submit an application to the

Commission for a license to construct such a facility as part of an integrated nuclear waste management system and in accordance with the provisions of this section and applicable agreements under this chapter affecting such facility.

(c) Licensing

Any monitored retrievable storage facility authorized pursuant to section 10162(b) of this title shall be subject to licensing under section 5842(3) of this title. In reviewing the application filed by the Secretary for licensing of such facility, the Commission may not consider the need for such facility or any alternative to the design criteria for such facility set forth in section 10161(b)(1) of this title.

(d) Licensing conditions

Any license issued by the Commission for a monitored retrievable storage facility under this section shall provide that –

(1) construction of such facility may not begin until the Commission has issued a license for the construction of a repository under section 10135(d) of this title;

(2) construction of such facility or acceptance of spent nuclear fuel or high-level radioactive waste shall be prohibited during such time as the repository license is revoked by the Commission or construction of the repository ceases;

(3) the quantity of spent nuclear fuel or high-level radioactive waste at the site of such facility at ~~any~~ one time may not exceed 10,000

metric tons of heavy metal until a repository under this chapter first accepts spent nuclear fuel or solidified high-level radioactive waste; and

(4) the quantity of spent nuclear fuel or high-level radioactive waste at the site of such facility at any one time may not exceed 15,000 metric tons of heavy metal.

(Pub. L. 97-425, title I, § 148, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5021, Dec. 22, 1987, 101 Stat. 1330-235.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a)(1), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10162 of this title.

§ 10169. Financial assistance

The provisions of section 10136(c) or 10138(b) of this title with respect to grants, technical assistance, and other

financial assistance shall apply to the State, to affected Indian tribes and to affected units of local government in the case of a monitored retrievable storage facility in the same manner as for a repository.

(Pub. L. 97-425, title I, § 149, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5021, Dec. 22, 1987, 101 Stat. 1330-236.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10162 of this title.

PART D – LOW-LEVEL RADIOACTIVE WASTE

§ 10171. Financial arrangements for low-level radioactive waste site closure

(a) Financial arrangements

(1) The Commission shall establish by rule, regulation, or order, after public notice, and in accordance with section 2231 of this title, such standards and instructions as the Commission may deem necessary or desirable to ensure in the case of each license for the disposal of low-level radioactive waste that an adequate bond, surety, or other financial arrangement (as determined by the Commission) will be provided by a licensee to permit completion of all requirements established by the Commission for the decontamination, decommissioning, site closure,

and reclamation of sites, structures, and equipment used in conjunction with such low-level radioactive waste. Such financial arrangements shall be provided and approved by the Commission, or, in the case of sites within the boundaries of any agreement State under section 2021 of this title, by the appropriate State or State entity, prior to issuance of licenses for low-level radioactive waste disposal or, in the case of licenses in effect on January 7, 1983, prior to termination of such licenses.

(2) If the Commission determines that any long-term maintenance or monitoring, or both, will be necessary at a site described in paragraph (1), the Commission shall ensure before termination of the license involved that the licensee has made available such bonding, surety, or other financial arrangements as may be necessary to ensure that any necessary long-term maintenance or monitoring needed for such site will be carried out by the person having title and custody for such site following license termination.

(b) Title and custody

(1) The Secretary shall have authority to assume title and custody of low-level radioactive waste and the land on which such waste is disposed of, upon request of the owner of such waste and land and following termination of the license issued by the Commission for such disposal, if the Commission determines that –

(A) the requirements of the Commission for site closure, decommissioning, and decontamination have been met by the licensee involved and that such licensee is in compliance

with the provisions of subsection (a) of this section;

(B) such title and custody will be transferred to the Secretary without cost to the Federal Government; and

(C) Federal ownership and management of such site is necessary or desirable in order to protect the public health and safety, and the environment.

(2) If the Secretary assumes title and custody of any such waste and land under this subsection, the Secretary shall maintain such waste and land in a manner that will protect the public health and safety, and the environment.

(c) Special sites

If the low-level radioactive waste involved is the result of a licensed activity to recover zirconium, hafnium, and rare earths from source material, the Secretary, upon request of the owner of the site involved, shall assume title and custody of such waste and the land on which it is disposed when such site has been decontaminated and stabilized in accordance with the requirements established by the Commission and when such owner has made adequate financial arrangements approved by the Commission for the long-term maintenance and monitoring of such site.

(Pub. L. 97-425, title I, § 151, Jan. 7, 1983, 96 Stat. 2244.)

PART E – REDIRECTION OF THE NUCLEAR WASTE PROGRAM

§ 10172. Selection of Yucca Mountain site

(a) In general

(1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.

(2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site, within 90 days after December 22, 1987.

(b) Eligibility to enter into benefits agreement

Effective on December 22, 1987, the State of Nevada shall be eligible to enter into a benefits agreement with the Secretary under section 10173 of this title.

(Pub. L. 97-425, title I, § 160, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5011(a), Dec. 22, 1987, 101 Stat. 1330-227.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10172a. Siting a second repository

(a) Congressional action required

The Secretary may not conduct site-specific activities with respect to a second repository unless Congress has

specifically authorized and appropriated funds for such activities.

(b) Report

The Secretary shall report to the President and to Congress on or after January 1, 2007, but not later than January 1, 2010, on the need for a second repository.

(c) Termination of granite research

Not later than 6 months after December 22, 1987, the Secretary shall phase out in an orderly manner funding for all research programs in existence on December 22, 1987, designed to evaluate the suitability of crystalline rock as a potential repository host medium.

(d) Additional siting criteria

In the event that the Secretary at any time after December 22, 1987, considers any sites in crystalline rock for characterization or selection as a repository, the Secretary shall consider (as a supplement to the siting guidelines under section 10132 of this title) such potentially disqualifying factors as –

(1) seasonal increases in population;

(2) proximity to public drinking water supplies, including those of metropolitan areas; and

(3) the impact that characterization or siting decisions would have on lands owned or placed in trust by the United States for Indian tribes.

(Pub. L. 97-425, title I, § 161, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5012, Dec. 22, 1987, 101 Stat. 1330-231.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

PART F – BENEFITS

PART REFERRED TO IN OTHER SECTIONS

This part is referred to in section 10133 of this title.

§ 10173. Benefits agreements

(a) In general

(1) The Secretary may enter into a benefits agreement with the State of Nevada concerning a repository or with a State or an Indian tribe concerning a monitored retrievable storage facility for the acceptance of high-level radioactive waste or spent nuclear fuel in that State or on the reservation of that tribe, as appropriate.

(2) The State or Indian tribe may enter into such an agreement only if the State Attorney General or the appropriate governing authority of the Indian tribe or the Secretary of the Interior, in the absence of an appropriate governing authority, as appropriate, certifies to the satisfaction of the Secretary that the laws of the State or Indian tribe provide adequate authority for the entity to enter into the benefits agreement.

(3) Any benefits agreement with a State under this section shall be negotiated in consultation with affected units of local government in such State.

(4) Benefits and payments under this part may be made available only in accordance with a benefits agreement under this section.

(b) Amendment

A benefits agreement entered into under subsection (a) of this section may be amended only by the mutual consent of the parties to the agreement and terminated only in accordance with section 10173c of this title.

(c) Agreement with Nevada

The Secretary shall offer to enter into a benefits agreement with the Governor of Nevada. Any benefits agreement with a State under this subsection shall be negotiated in consultation with any affected units of local government in such State.

(d) Monitored retrievable storage

The Secretary shall offer to enter into a benefits agreement relating to a monitored retrievable storage facility with the governing body of the Indian tribe on whose reservation the site for such facility is located, or, if the site is not located on a reservation, with the Governor of the State in which the site is located and in consultation with affected units of local government in such State.

(e) Limitation

Only one benefits agreement for a repository and only one benefits agreement for a monitored retrievable storage facility may be in effect at any one time.

(f) Judicial review

Decisions of the Secretary under this section are not subject to judicial review.

(Pub. L. 97-425, title I, § 170, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5031, Dec. 22, 1987, 101 Stat. 1330-237.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10167, 10172, 10173a of this title.

§ 10173a. Content of agreements

(a) In general

(1) In addition to the benefits to which a State, an affected unit of local government or Indian tribe is entitled under this subchapter, the Secretary shall make payments to a State or Indian tribe that is a party to a benefits agreement under section 10173 of this title in accordance with the following schedule:

BENEFITS SCHEDULE

(amounts in $ millions)

Event	MRS	Repository
(A) Annual payments prior to first spent fuel receipt.....	5	10
(B) Upon first spent fuel receipt	10	20
(C) Annual payments after first spent fuel receipt until closure of the facility	10	20

(2) For purposes of this section, the term –

(A) "MRS" means a monitored retrievable storage facility,

(B) "spent fuel" means high-level radioactive waste or spent nuclear fuel, and

(C) "first spent fuel receipt" does not include receipt of spent fuel or high-level radioactive waste for purposes of testing or operational demonstration.

(3) Annual payments prior to first spent fuel receipt under paragraph (1)(A) shall be made on the date of execution of the benefits agreement and thereafter on the anniversary date of such execution. Annual payments after the first spent fuel receipt until closure of the facility under paragraph (1)(C) shall be made on the anniversary date of such first spent fuel receipt.

(4) If the first spend fuel payment under paragraph (1)(B) is made within six months after the last annual

payment prior to the receipt of spent fuel under paragraph (1)(A), such first spent fuel payment under paragraph (1)(B) shall be reduced by an amount equal to one-twelfth of such annual payment under paragraph (1)(A) for each full month less than six that has not elapsed since the last annual payment under paragraph (1)(A).

(5) Notwithstanding paragraph (1), (2), or (3), no payment under this section may be made before January 1, 1989, and any payment due under this subchapter before January 1, 1989, shall be made on or after such date.

(6) Except as provided in paragraph (7), the Secretary may not restrict the purposes for which the payments under this section may be used.

(7)(A) Any State receiving a payment under this section shall transfer an amount equal to not less than one-third of the amount of such payment to affected units of local government of such State.

(B) A plan for this transfer and appropriate allocation of such portion among such governments shall be included in the benefits agreement under section 10173 of this title covering such payments.

(C) In the event of a dispute concerning such plan, the Secretary shall resolve such dispute, consistent with this chapter and applicable State law.

(b) Contents

A benefits agreement under section 10173 of this title shall provide that –

(1) a Review Panel be established in accordance with section 10173b of this title;

(2) the State of Indian tribe that is party to such agreement waive its rights under this subchapter to disapprove the recommendation of a site for a repository;

(3) the parties to the agreement shall share with one another information relevant to the licensing process for the repository or monitored retrievable storage facility, as it becomes available;

(4) the State or Indian tribe that is party to such agreement participate in the design of the repository or monitored retrievable storage facility and in the preparation of documents required under law or regulation governing the effects of the facility on the public health and safety; and

(5) the State or Indian tribe waive its rights, if any, to impact assistance under sections 10136(c)(1)(B)(ii), 10136(c)(2), 10138(b)(2)(A)(ii), and 10138(b)(3) of this title.

(c) Payments by Secretary

The Secretary shall make payments to the States or affected Indian tribes under a benefits agreement under this section from the Waste Fund. The signature of the Secretary on a valid benefits agreement under section 10173 of this title shall constitute a commitment by the United States to make payments in accordance with such agreement.

(Pub. L. 97-425, title I, § 171, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5031, Dec. 22, 1987, 101 Stat. 1330-237.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10173b, 10174a of this title.

§ 10173b. Review Panel

(a) In general

The Review Panel required to be established by section 10173a(b)(1) of this title shall consist of a Chairman selected by the Secretary in consultation with the Governor of the State or governing body of the Indian tribe, as appropriate, that is party to such agreement and 6 other members as follows:

(1) 2 members selected by the Governor of such State or governing body of such Indian tribe;

(2) 2 members selected by units of local government affected by the repository or monitored retrievable storage facility;

(3) 1 member to represent persons making payments into the Waste Fund, to be selected by the Secretary; and

(4) 1 member to represent other public interests, to be selected by the Secretary.

(b) Terms

(1) The members of the Review Panel shall serve for terms of 4 years each.

(2) Members of the Review Panel who are not full-time employees of the Federal Government, shall receive a per diem compensation for each day spent conducting work of the Review Panel, including their necessary travel or other expenses while engaged in the work of the Review Panel.

(3) Expenses of the Panel shall be paid by the Secretary from the Waste Fund.

(c) Duties

The Review Panel shall –

(1) advise the Secretary on matters relating to the proposed repository or monitored retrievable storage facility, including issues relating to design, construction, operation, and decommissioning of the facility;

(2) evaluate performance of the repository or monitored retrievable storage facility, as it considers appropriate;

(3) recommend corrective actions to the Secretary;

(4) assist in the presentation of State or affected Indian tribe and local perspectives to the Secretary; and

(5) participate in the planning for and the review of preoperational data on environmental, demographic, and socioeconomic conditions of the site and the local community.

(d) Information

The Secretary shall promptly[1] make available promptly[1] any information in the Secretary's possession requested by the Panel or its Chairman.

(e) Federal Advisory Committee Act

The requirements of the Federal Advisory Committee Act shall not apply to a Review Panel established under this subchapter.

(Pub. L. 97-425, title I, § 172, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5031, Dec. 22, 1987, 101 Stat. 1330-239.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in subsec. (e), is Pub. L.92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

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[1] So in original.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10173a of this title.

§ 10173c. Termination

(a) In general

The Secretary may terminate a benefits agreement under this subchapter if –

(1) the site under consideration is disqualified for its failure to comply with guidelines and technical requirements established by the Secretary in accordance with this chapter; or

(2) the Secretary determines that the Commission cannot license the facility within a reasonable time.

(b) Termination by State or Indian tribe

A State or Indian tribe may terminate a benefits agreement under this subchapter only if the Secretary disqualifies the site under consideration for its failure to comply with technical requirements established by the Secretary in accordance with this chapter or the Secretary determines that the Commission cannot license the facility within a reasonable time.

(c) Decisions of Secretary

Decision of the Secretary under this section shall be in writing, shall be available to Congress and the public, and are not subject to judicial review.

(Pub. L. 97-425, title I, § 173, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5031, Dec. 22, 1987, 101 Stat. 1330-240.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10173 of this title.

PART G – OTHER BENEFITS

§ 10174. Consideration in siting facilities

The Secretary, in siting Federal research projects, shall give special consideration to proposals from States where a repository is located.

(Pub. L. 97-425, title I, § 174, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5031, Dec. 22, 1987, 101 Stat. 1330-240.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10174a. Report.

(a) In general

Within one year of December 22, 1987, the Secretary shall report to Congress on the potential impacts of

locating a repository at the Yucca Mountain site, including the recommendations of the Secretary for mitigation of such impacts and a statement of which impacts should be dealt with by the Federal Government, which should be dealt with by the State with State resources, including the benefits payments under section 10173a of this title, and which should be a joint Federal-State responsibility. The report under this subsection shall include the analysis of the Secretary of the authorities available to mitigate these impacts and the appropriate sources of funds for such mitigation.

(b) Impacts to be considered

Potential impacts to be addressed in the report under this[1] subsection (a) of this section shall include impacts on –

(1) education, including facilities and personnel for elementary and secondary schools, community colleges, vocational and technical schools and universities;

(2) public health, including the facilities and personnel for treatment and distribution of water, the treatment of sewage, the control of pests and the disposal of solid waste;

(3) law enforcement, including facilities and personnel for the courts, police and sheriff's departments, district attorneys and public defenders and prisons;

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[1] So in original. The word "this" probably should not appear.

(4) fire protection, including personnel, the construction of fire stations, and the acquisition of equipment;

(5) medical care, including emergency services and hospitals;

(6) cultural and recreational needs, including facilities and personnel for libraries and museums and the acquisition and expansion of parks;

(7) distribution of public lands to allow for the timely expansion of existing, or creation of new, communities and the construction of necessary residential and commercial facilities;

(8) vocational training and employment services;

(9) social services, including public assistance programs, vocational and physical rehabilitation programs, mental health services, and programs relating to the abuse of alcohol and controlled substances;

(10) transportation, including any roads, terminals, airports, bridges, or railways associated with the facility and the repair and maintenance of roads, terminals, airports, bridges, or railways damaged as a result of the construction, operation, and closure of the facility;

(11) equipment and training for State and local personnel in the management of accidents involving high-level radioactive waste;

(12) availability of energy;

(13) tourism and economic development, including the potential loss of revenue and future economic growth; and

(14) other needs of the State and local governments that would not have arisen but for the characterization of the site and the construction, operation, and eventual closure of the repository facility.

(Pub. L. 97-425, title I, § 175, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5031, Dec. 22, 1987, 101 Stat. 1330-240.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

PART H – TRANSPORTATION

§ 10175. Transportation

(a) Packaging

No spent nuclear fuel or high-level radioactive waste may be transported by or for the Secretary under part A of this subchapter or under part C of this subchapter except in packages that have been certified for such purpose by the Commission.

(b) Advance notification

The Secretary shall abide by regulations of the Commission regarding advance notification of State and local governments prior to transportation of spent nuclear fuel or high-level radioactive waste under part A of this subchapter or under part C of this subchapter.

(c) Training for public safety officials

The Secretary shall provide technical assistance and funds to States for training for public safety officials of appropriate units of local government and Indian tribes through whose jurisdiction the Secretary plans to transport spent nuclear fuel or high-level radioactive waste under part A of this subchapter or under part C of this subchapter. Training shall cover procedures required for safe routine transportation of these materials, as well as procedures for dealing with emergency response situations. The Waste Fund shall be the source of funds for work carried out under this subsection.

(Pub. L. 97-425, title I, § 180, as added Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5061, Dec. 22, 1987, 101 Stat. 1330-251.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SUBCHAPTER II – RESEARCH, DEVELOPMENT, AND DEMONSTRATION REGARDING DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 10139, 10222 of this title.

§ 10191. Purpose

It is the purpose of this subchapter –

(1) to provide direction to the Secretary with respect to the disposal of high-level radioactive waste and spent nuclear fuel;

(2) to authorize the Secretary, pursuant to this subchapter –

(A) to provide for the construction, operation, and maintenance of a deep geologic test and evaluation facility; and

(B) to provide for a focused and integrated high-level radioactive waste and spent nuclear fuel research and development program, including the development of a test and evaluation facility to carry out research and provide an integrated demonstration of the technology for deep geologic disposal of high-level radioactive waste, and the development of the facilities to demonstrate dry storage of spent nuclear fuel; and

(3) to provide for an improved cooperative role between the Federal Government and States, affected Indian tribes, and units of general local government in the siting of a test and evaluation facility.

(Pub. L. 97-425, title II, § 211, Jan. 7, 1983, 96 Stat. 2245.)

§ 10192. Applicability

The provisions of this subchapter are subject to section 10107 of this title and shall not apply to facilities that are used for the disposal of high-level radioactive waste,

low-level radioactive waste, transuranic waste, or spent nuclear fuel resulting from atomic energy defense activities.

(Pub. L. 97-425, title II, § 212, Jan. 7, 1983, 96 Stat. 2245.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10197 of this title.

§ 10193. Identification of sites

(a) Guidelines

Not later than 6 months after January 7, 1983, and notwithstanding the failure of other agencies to promulgate standards pursuant to applicable law, the Secretary, in consultation with the Commission, the Director of the Geological Survey, the Administrator, the Council on Environmental Quality, and such other Federal agencies as the Secretary considers appropriate, is authorized to issue, pursuant to section 553 of title 5, general guidelines for the selection of a site for a test and evaluation facility. Under such guidelines the Secretary shall specify factors that qualify or disqualify a site for development as a test and evaluation facility, including factors pertaining to the location of valuable natural resources, hydrogeophysics, seismic activity, and atomic energy defense activities, proximity to water supplies, proximity to populations, the effect upon the rights of users of water, and proximity to components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Lands. Such guidelines shall

require the Secretary to consider the various geologic media in which the site for a test and evaluation facility may be located and, to the extent practicable, to identify sites in different geologic media. The Secretary shall use guidelines established under this subsection in considering the selection sites under this subchapter.

(b) Site identification by Secretary

(1) Not later than 1 year after January 7, 1983, and following promulgation of guidelines under subsection (a) of this section, the Secretary is authorized to identify 3 or more sites, at least 2 of which shall be in different geologic media in the continental United States, and at least 1 of which shall be in media other than salt. Subject to Commission requirements, the Secretary shall give preference to sites for the test and evaluation facility in media possessing geochemical characteristics that retard aqueous transport of radionuclides. In order to provide greater possible protection of public health and safety as operating experience is gained at the test and evaluation facility, and with the exception of the primary areas under review by the Secretary on January 7, 1983, for the location of a test and evaluation facility or repository, all sites identified under this subsection shall be more than 15 statute miles from towns having a population of greater than 1,000 persons as determined by the most recent census unless such sites contain high-level radioactive waste prior to identification under this subchapter. Each identification of a site shall be supported by an environmental assessment, which shall include a detailed statement of the basis for such identification and of the probable impacts of the siting research activities planned

for such site, and a discussion of alternative activities relating to siting research that may be undertaken to avoid such impacts. Such environmental assessment shall include –

(A) an evaluation by the Secretary as to whether such site is suitable for siting research under the guidelines established under subsection (a) of this section;

(B) and evaluation by the Secretary of the effects of the siting research activities at such site on the public health and safety and the environment;

(C) a reasonable comparative evaluation by the Secretary of such site with other sites and locations that have been considered;

(D) a description of the decision process by which such site was recommended; and

(E) an assessment of the regional and local impacts of locating the proposed test and evaluation facility at such site.

(2) When the Secretary identifies a site, the Secretary shall as soon as possible notify the Governor of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, of such identification and the basis of such identification. Additional sites for the location of the test and evaluation facility authorized in section 10222(d) of this title may be identified after such 1 year period, following the same procedure as if such sites had been identified within such period.

(Pub. L. 97-425, title II, § 213, Jan. 7, 1983, 96 Stat. 2245.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10194, 10195, 10199 of this title.

§ 10194. Siting research and related activities

(a) In general

Not later than 30 months after the date on which the Secretary completes the identification of sites under section 10193 of this title, the Secretary is authorized to complete sufficient evaluation of 3 sites to select a site for expanded siting research activities and for other activities under section 10198 of this title. The Secretary is authorized to conduct such preconstruction activities relative to such site selection for the test and evaluation facility as he deems appropriate. Additional sites for the location of the test and evaluation facility authorized in section 10222(d) of this title may be evaluated after such 30-month period, following the same procedures as if such sites were to be evaluated within such period.

(b) Public meetings and environmental assessment

Not later than 6 months after the date on which the Secretary completes the identification of sites under section 10193 of this title, and before beginning siting research activities, the Secretary shall hold a least 1 public meeting in the vicinity of each site to inform the residents of the area of the activities to be conducted at such site and to receive their views.

(c) Restrictions

Except as provided in section 10198 of this title with respect to a test and evaluation facility, in conducting siting research activities pursuant to subsection (a) of this section –

(1) the Secretary shall use the minimum quantity of high-level radioactive waste or other radioactive materials, if any, necessary to achieve the test or research objectives;

(2) the Secretary shall ensure that any radioactive material used or placed on a site shall be fully retrievable; and

(3) upon termination of siting research activities at a site for any reason, the Secretary shall remove any radioactive material at or in the site as promptly as practicable.

(d) Title to material

The Secretary may take title, in the name of the Federal Government, to the high-level radioactive waste, spent nuclear fuel, or other radioactive material emplaced in a test and evaluation facility. If the Secretary takes title to any such material, the Secretary shall enter into the appropriate financial arrangements described in subsection (a) or (b) of section 10222 of this title for the disposal of such material.

(Pub. L. 97-425, title II, § 214, Jan. 7, 1983, 96 Stat. 2247.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10197, 10198 of this title.

§ 10195. Test and evaluation facility siting review and reports

(a) Consultation and cooperation

The Governor of a State, or the governing body of an affected Indian tribe, notified of a site identification under section 10193 of this title shall have the right to participate in a process of consultation and cooperation as soon as the site involved has been identified pursuant to such section and throughout the life of the test and evaluation facility. For purposes of this section, the term "process of consultation and cooperation" means a methodology –

(1) by which the Secretary –

(A) keeps the Governor or governing body involved fully and currently informed about any potential economic or public health and safety impacts in all stages of the siting, development, construction, and operation of a test and evaluation facility;

(B) solicits, receives, and evaluates concerns and objections of such Governor or governing body with regard to such test and evaluation facility on an ongoing basis; and

(C) works diligently and cooperatively to resolve such concerns and objections; and

(2) by which the State or affected Indian tribe involved can exercise reasonable independent monitoring and testing of onsite activities related to all stages of the siting, development, construction and operation of the test and evaluation facility, except that any such monitoring and testing shall not unreasonably interfere with onsite activities.

(b) Written agreements

The Secretary shall enter into written agreements with the Governor of the State in which an identified site is located or with the governing body of any affected Indian tribe where an identified site is located in order to expedite the consultation and cooperation process. Any such written agreement shall specify –

(1) procedures by which such Governor or governing body may study, determine, comment, on, and make recommendations with regard to the possible health, safety, and economic impacts of the test and evaluation facility;

(2) procedures by which the Secretary shall consider and respond to comments and recommendations made by such Governor or governing body, including the period in which the Secretary shall so respond;

(3) the documents the Department is to submit to such Governor or governing body, the timing for such submissions, the timing for such Governor or governing body to identify public health and safety concerns and the process to be followed to try to eliminate those concerns;

(4) procedures by which the Secretary and either such Governor or governing body may review or modify the agreement periodically; and

(5) procedures for public notification of the procedures specified under subparagraphs (A) through (D).

(c) Limitation

Except as specifically provided in this section, nothing in this subchapter is intended to grant any State or affected Indian tribe any authority with respect to the siting, development, or loading of the test, and evaluation facility.

(Pub. L. 97-425, title II, § 215, Jan. 7, 1983, 96 Stat. 2247.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10199 of this title.

§ 10196. Federal agency actions

(a) Cooperation and coordination

Federal agencies shall assist the Secretary by cooperating and coordinating with the Secretary in the preparation of any necessary reports under this subchapter and the mission plan under section 10221 of this title.

(b) Environmental review

(1) No action of the Secretary or any other Federal agency required by this subchapter or section 10221 of

this title with respect to a test and evaluation facility to be taken prior to the initiation of onsite construction of a test and evaluation facility shall require the preparation of an environmental impact statement under section 102(2)(C) of the Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to require the preparation of environmental reports, except as otherwise specifically provided for in this subchapter.

(2) The Secretary and the heads of all other Federal agencies shall, to the maximum extent possible, avoid duplication of efforts in the preparation of reports under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(Pub. L. 97-425, title II, § 216, Jan. 7, 1983, 96 Stat.2248.)

REFERENCE IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (b)(2), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et. seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

§ 10197. Research and development on disposal of high-level radioactive waste

(a) Purpose

Not later than 64 months after January 7, 1983, the Secretary is authorized to, to the extent practicable, begin at a site evaluated under section 10194 of this title, as part of and as an extension of siting research activities of such

site under such section, the mining and construction of a test and evaluation facility. Prior to the mining and construction of such facility, the Secretary shall prepare an environmental assessment. The purpose of such facility shall be –

(1) to supplement and focus the repository site characterization process;

(2) to provide the conditions under which known technological components can be integrated to demonstrate a functioning repository-like system;

(3) to provide a means of identifying, evaluating, and resolving potential repository licensing issues that could not be resolved during the siting research program conducted under section 10192 of this title;

(4) to validate, under actual conditions, the scientific models used in the design of a repository;

(5) to refine the design and engineering of repository components and systems and to confirm the predicted behavior of such components and systems;

(6) to supplement the siting data, the generic and specific geological characteristics developed under section 10194 of this title relating to isolating disposal materials in the physical environment of a repository;

(7) to evaluate the design concepts for packaging, handling, and emplacement of high-level radioactive waste and spent nuclear fuel at the design rate; and

(8) to establish operating capability without exposing workers to excessive radiation.

(b) Design

The Secretary shall design each test and evaluation facility –

(1) to be capable of receiving not more than 100 full-sized canisters of solidified high-level radioactive waste (which canisters shall not exceed an aggregate weight of 100 metric tons), except that spent nuclear fuel may be used instead of such waste if such waste cannot be obtained under reasonable conditions;

(2) to permit full retrieval of solidified high-level radioactive waste, or other radioactive material used by the Secretary for testing, upon completion of the technology demonstration activities; and

(3) based upon the principle that the high-level radioactive waste, spent nuclear fuel, or other radioactive material involved shall be isolated from the biosphere in such a way that the initial isolation is provided by engineered barriers functioning as a system with the geologic environment.

(c) Operation

(1) Not later than 88 months after January 7, 1983, the Secretary shall begin an in situ testing program at the test and evaluation facility in accordance with the mission plan developed under section 10221 of this title, for purposes of –

(A) conducting in situ tests of bore hole sealing, geologic media fracture sealing, and room closure to establish the techniques and performance for isolation of high-level radioactive waste, spent nuclear fuel, or other radioactive materials from the biosphere;

(B) conducting in situ tests with radioactive sources and materials to evaluate and improve reliable models for radionuclide migration, absorption, and containment within the engineered barriers and geologic media involved, if the Secretary finds there is reasonable assurance that such radioactive sources and materials will not threaten the use of such site as a repository;

(C) conducting in situ tests to evaluate and improve models for ground water or brine flow through fractured geologic media;

(D) conducting in situ tests under conditions representing the real time and the accelerated time behavior of the engineered barriers within the geologic environment involved;

(E) conducting in situ tests to evaluate the effects of heat and pressure on the geologic media involved, on the hydrology of the surrounding area, and on the integrity of the disposal packages;

(F) conducting in situ tests under both normal and abnormal repository conditions to establish safe design limits for disposal packages and to determine the effects of the gross release of radionuclides into surroundings, and the effects of various credible failure modes, including –

(i) seismic events leading to the coupling of aquifers through the test and evaluation facility;

(ii) thermal pulses significantly greater than the maximum calculated; and

(iii) human intrusion creating a direct pathway to the biosphere; and

(G) conducting such other research and development activities as the Secretary considers appropriate, including such activities necessary to obtain the use of high-level radioactive waste, spent nuclear fuel, or other radioactive materials (such as any highly radioactive material from the Three Mile Island nuclear powerplant or from the West Valley Demonstration Project) for test and evaluation purposes, if such other activities are reasonably necessary to support the repository program and if there is reasonable assurance that the radioactive sources involved will not threaten the use of such site as a repository.

(2) The in situ testing authorized in this subsection shall be designed to ensure that the suitability of the site involved for licensing by the Commission as a repository will not be adversely affected.

(d) Use of existing Department facilities

During the conducting of siting research activities under section 10194 of this title and for such period thereafter as the Secretary considers appropriate, the Secretary shall use Department facilities owned by the Federal Government on January 7, 1983, for the conducting

of generically applicable tests regarding packaging, handling, and emplacement technology for solidified high-level radioactive waste and spent nuclear fuel from civilian nuclear activities.

(e) Engineered barriers

The system of engineered barriers and selected geology used in a test and evaluation facility shall have a design life at least as long as that which the Commission requires by regulations issued under this chapter, or under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.), for repositories.

(f) Role of Commission

(1)(A) Not later than 1 year after January 7, 1983, the Secretary and the Commission shall reach a written understanding establishing the procedures for review, consultation, and coordination in the planning, construction, and operation of the test and evaluation facility under this section. Such understanding shall establish a schedule, consistent with the deadlines set forth in this subchapter,[1] for submission by the Secretary of, and review by the Commission of and necessary action on –

(i) the mission plan prepared under section 10221 of this title; and

(ii) such reports and other information as the Commission may reasonably require

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[1] See References in Test note below.

to evaluate any health and safety impacts of the test and evaluation facility.

(B) Such understanding shall also establish the conditions under which the Commission may have access to the test and evaluation facility for the purpose of assessing any public health and safety concerns that it may have. No shafts may be excavated for the test and evaluation until the Secretary and the Commission enter into such understanding.

(2) Subject to section 10225 of this title, the test and evaluation facility, and the facilities authorized in this section shall be constructed and operated as research, development, and demonstration facilities, and shall not be subject to licensing under section 5842 of this title.

(3)(A) The Commission shall carry out a continuing analysis of the activities undertaken under this section to evaluate the adequacy of the consideration of public health and safety issues.

(B) The Commission shall report to the President, the Secretary, and the Congress as the Commission considers appropriate with respect to the conduct of activities under this section.

(g) Environmental review

The Secretary shall prepare an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) prior to conducting tests with radioactive materials at the test

and evaluation facility. Such environmental impact statement shall incorporate, to the extent practicable, the environmental assessment prepared under subsection (a) of this section. Nothing in this subsection may be construed to limit siting research activities conducted under section 10194 of this title. This subsection shall apply only to activities performed exclusively for a test and evaluation facility.

(h) Limitations

(1) If the test and evaluation facility is not located at the site of a repository, the Secretary shall obtain the concurrence of the Commission with respect to the decontamination and recommissioning of such facility.

(2) If the test and evaluation facility is not located at a candidate site or repository site, the Secretary shall conduct only the portion of the in situ testing program required in subsection (c) of this section determined by the Secretary to be useful in carrying out the purpose of this chapter.

(3) The operation of the test and evaluation facility shall terminate not later than –

(A) 5 years after the date on which the initial repository begins operation; or

(B) at such time as the Secretary determines that the continued operation of a test and evaluation facility is not necessary for research, development, and demonstration purposes;

whichever occurs sooner.

(4) Notwithsanding any other provisions of this subsection, as soon as practicable following any determination by the Secretary, with the concurrence of the Commission, that the test and evaluation facility is unsuitable for continued operation, the Secretary shall take such actions as are necessary to remove from such site any radioactive material placed on such site as a result of testing and evaluation activities conducted under this section. Such requirement may be waived if the Secretary, with the concurrence of the Commission, finds that short-term testing and evaluation activities using radioactive material will not endanger the public health and safety.

(Pub. L. 97-425, title II, § 217, Jan. 7, 1983, 96 Stat. 2249.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in subsec. (e), is act Aug. 30, 1954, ch. 1073, 68 Stat. 921, as amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

This Subchapter, referred to in subsec. (f)(1)(A), was in the original "this subtitle", and was translated as this subchapter to reflect the probable intent of Congress because title II of Pub. L. 97-425, which enacted this subchapter, does not contain subtitles.

SECTIONS REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10199 of this title.

§ 10198. Research and development on spent nuclear fuel

(a) Demonstration and cooperative programs

The Secretary shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission. Not later than 1 year after January 7, 1983, the Secretary shall select at least 1, but not more than 3 sites evaluated under section 10194 of this title at such power reactors. In selecting such site or sites, the Secretary shall give preference to civilian nuclear power reactors that will soon have a shortage of interim storage capacity for spent nuclear fuel. Subject to reaching agreement as provided in subsection (b) of this section, the Secretary shall undertake activities to assist such power reactors with demonstration projects at such sites, which may use one of the following types of alternate storage technologies: spent nuclear fuel storage casks, caissons, or silos. The Secretary shall also undertake a cooperative program with civilian nuclear power reactors to encourage the development of the technology for spent nuclear fuel rod consolidation in existing power reactor water storage basins.

(b) Cooperative agreements

To carry out the programs described in subsection (a) of this section, the Secretary shall enter into a cooperative

agreement with each utility involved that specifies, at a minimum, that –

(1) such utility shall select the alternate storage technique to be used, make the land and spent nuclear fuel available for the dry storage demonstrating, submit and provide site-specific documentation for a license application to the Commission, obtain a license relating to the facility involved, construct such facility, operate such facility after licensing, pay the costs required to construct such facility, and pay all costs associated with the operation and maintenance of such facility;

(2) the Secretary shall provide, on a cost-sharing basis, consultative and technical assistance, including design support and generic licensing documentation, to assist such utility in obtaining the construction authorization and appropriate license from the Commission; and

(3) the Secretary shall provide generic research and development of alternative spent nuclear fuel storage techniques to enhance utility-provided, at-reactor storage capabilities, if authorized in any other provision of this chapter or in any other provision of law.

(c) Dry Storage research and development

(1) The consultative and technical assistance referred to in subsection (b)(2) of this section may include, but shall not be limited to, the establishment of a research and development program for the dry storage of not more than 300 metric tons of spent nuclear fuel at facilities owned by the Federal Government on January 7,

1983. The purpose of such program shall be to collect necessary data to assist the utilities involved in the licensing process.

(2) To the extent available, and consistent with the provisions of section 10155 of this title, the Secretary shall provide spent nuclear fuel for the research and development program authorized in this subsection from spent nuclear fuel received by the Secretary for storage under section 10155 of this title. Such spent nuclear fuel shall not be subject to the provisions of section 10155(e) of this title.

(d) Funding

The total contribution from the Secretary from Federal funds and the use of Federal facilities or services shall not exceed 25 percent of the total costs of the demonstration program authorized in subsection (a) of this section, as estimated by the Secretary. All remaining costs of such program shall be paid by the utilities involved or shall be provided by the Secretary from the Interim Storage Fund established in section 10156 of the title.

(e) Relation to spent nuclear fuel storage program

The spent nuclear fuel storage program authorized in section 10155 of this title shall not be construed to authorize the use of research development or demonstration facilities owned by the Department unless –

(1) a period of 30 calendar days (not including any day in which either House of

Congress is not in session because of adjournment of more than 3 calendar days to a day certain) has passed after the Secretary has transmitted to the Committee on Science and Technology of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a written report containing a full and complete statement concerning (A) the facility involved; (B) any necessary modifications; (C) the cost thereof; and (D) the impact on the authorized research and development program; or

(2) each such committee, before the expiration of such period, has transmitted to the Secretary a written notice to the effect that such committee has no obligation to the proposed use of such facility.

(Pub. L. 97-425, title II, § 218, Jan. 7, 1983, 96 Stat. 2252.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10153, 10155, 10194 of this title.

§ 10199. Payments to States and Indian Tribes

(a) Payments

Subject to subsection (b) of this section, the Secretary shall make payments to each State or affected Indian tribe that has entered into an agreement pursuant to section 10195 of this title. The Secretary shall pay an amount equal to 100 percent of the expenses incurred by such State or Indian tribe in engaging in any monitoring, testing, evaluation, or other consultation and cooperation

activity under section 10195 of this title with respect to any site. The amount paid by the Secretary under this paragraph shall not exceed $3,000,000 per year from the date on which the site involved was identified to the date on which the decontamination and decommission of the facility is complete pursuant to section 10197(h) of this title. Any such payment may only be made to a State in which a potential site for a test and evaluation facility has been identified under section 10193 of this title, or to an affected Indian tribe where the potential site has been identified under such section.

(b) Limitation

The Secretary shall make any payment to a State under subsection (a) of this section only if such State agrees to provide, to each unit of general local government within the jurisdiction boundaries of which the potential site or effectively selected site involved is located, at least one-tenth of the payments made by the Secretary to such State under such subsection. A State of affected Indian tribe relieving any payment under subsection (a) of this section shall otherwise have discretion to use such payment for whatever purpose it deems necessary, including the State or tribal activities pursuant to agreements entered into in accordance with section 10195 of this title. Annual payments shall be prorated on a 365-day basis to the specified dates.

(Pub. L. 97-425, title II, § 219, Jan. 7, 1983, 96 Stat.2253.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10222 of this title.

§ 10200. Study of research and development needs for monitored retrievable storage proposal

Not later than 6 months after January 7, 1983, the Secretary shall submit to the Congress a report describing the research and development activities the Secretary considers necessary to develop the proposal required in section 10161(b) of this title with respect to a monitored retrievable storage facility.

(Pub. L. 97-425, title II, § 220, Jan.7, 1983, 96 Stat. 2254.)

§ 10201. Judicial review

Judicial review of research and development activities under the subchapter shall be in accordance with the provisions of section 10139 of this title.

(Pub. L. 97-425, title II, § 220, Jan. 7, 1983, 96 Stat. 2254.)

§ 10202. Research on alternatives for the permanent disposal of high-level radioactive waste

The Secretary shall continue and accelerate a program of research, development, and investigation of alternative means and technologies for the permanent disposal of high-level radioactive waste from civilian nuclear activities and Federal research and development activities except that funding shall be made from amounts appropriated to the Secretary for purposes of carrying out this section. Such program shall include examination of various waste disposal options.

(Pub. L. 97-425, title II, § 222. Jan. 7, 1983, 96 Stat.2254.)

§ 10203. Technical assistance to non-nuclear weapon states in the field of spent fuel storage and disposal

(a) Statement of policy

It shall be the policy of the United States to cooperate with and provide technical assistance to non-nuclear weapon states in the field of spent fuel storage and disposal.

(b) Publication of joint notice; update

(1) Within 90 days of January 7, 1983, the Secretary and the Commission shall publish a joint notice in the Federal Register stating that the United States is prepared to cooperate with and provide technical assistance to non-nuclear weapon states in the fields of at-reactor spent fuel storage; away-from-reactor spent fuel storage; monitored, retrievable spent fuel storage; geologic disposal of spent fuel; and the health, safety, and environmental regulation of such activities. The notice shall summarize the resources that can be made available for international cooperation and assistance in these fields through existing programs of the Department and the Commission, including the availability of: (i) data from the past or ongoing research and development projects; (ii) consultations with expert Department of Commission personnel or contractors; and (iii) liaison with private business entities and organizations working in these fields.

(2) The joint notice described in the preceding subparagraph shall be updated and reissued annually for 5 succeeding years.

(c) Notification to non-nuclear weapon states; expressions of interest

Following publication of the annual joint notice referred to in paragraph (2), the Secretary of State shall inform the governments of non-nuclear weapon states and, as feasible, the organizations operating nuclear powerplants in such states, that the United States is prepared to cooperate with and provide technical assistance to non-nuclear weapon states in the fields of spent fuel storage and disposal, as set forth in the joint notice. The Secretary of State shall also solicit expressions of interest from non-nuclear weapon state governments and non-nuclear weapon state nuclear power reactor operators concerning their participation in expanded United States cooperation and technical assistance programs in these fields. The Secretary of State shall transmit any such expressions of interest to the Department and the Commission.

(d) Funding requests

With his budget presentation material for the Department and the Commission for fiscal years 1984 through 1989, the President shall include funding requests for an expanded program of cooperation and technical assistance with non-nuclear weapon states in the fields of spent fuel storage and disposal as appropriate in light of expressions of interest in such cooperation and assistance on the part of non-nuclear weapon state governments and non-nuclear weapon state nuclear power reactor operators.

(e) "Non-nuclear weapon state" defined

For the purposes of this subsection,[2] the term "non-nuclear weapon state" shall have the same meaning as that set forth in article IX of the Treaty on the Non-Proliferation of Nuclear Weapons (21 U.S.C.[3] 438).

(f) Unauthorized actions

Nothing in this subsection[2] shall authorize the Department or the Commission to take any action not authorized under existing law.

(Pub. L. 97-425, title II, § 223, Jan.7, 1983, 96 Stat.2254.)

REFERENCES IN TEXT

The Treaty on the Non-Proliferation of Nuclear Weapons, referred to in subsec, (e), is set out in 21 UST 483; TIAS 6839.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 5057.

§ 10204. Subseabed disposal

(a) Study

Within 270 days after December 22, 1987, the Secretary shall report to Congress on subseabed disposal of

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[2] So in original. Probably should be "section".

[3] So in original. Probably should be "UST".

spent nuclear fuel and high-level radioactive waste. The report under this subsection shall include –

(1) an assessment of the current state of knowledge of subseabed disposal as an alternative technology for disposal of spent nuclear fuel and high-level radioactive waste;

(2) an estimate of the costs of subseabed disposal;

(3) an analysis of institutional facts associated with subseabed disposal, including international aspects of a decision of the United States to proceed with subseabed disposal as an option for nuclear waste management;

(4) a full discussion of the environmental and public health and safety aspects of subseabed disposal;

(5) recommendations on alternative ways to structure an effort in research, development, and demonstration with respect to subseabed disposal;

(6) the recommendations of the Secretary with respect to research, development and demonstration in subseabed disposal of spent nuclear fuel and high-level radioactive waste.

(b) Office of Subseabed Disposal Research

(1) There is hereby established an Office of Subseabed Disposal Research within the Office of Energy Research of the Department of Energy. The Office shall be headed by the Director, who shall be a member of the Senior Executive Service appointed by the Director of the

Office of Energy Research, and compensated at a rate determined by applicable law.

(2) The Director of the Office of Subseabed Disposal Research shall be responsible for carrying out research, development, and demonstration activities on all aspects of subseabed disposal of high-level radioactive waste and spent nuclear fuel, subject to the general supervision of the Secretary. The Director of the Office shall be directly responsible to the Director of the Office of Energy Research, and the first such Director shall be appointed within 30 days of December 22, 1987.

(3) In carrying out his responsibilities under this chapter, the Secretary may make grants to, or enter into contracts with, the Subseabed Consortium described in subsection (d) of this section, and other persons.

(4)(A) Within 60 days of December 22, 1987, the Secretary shall establish a university-based Subseabed Consortium involving leading oceanographic universities and institutions, national laboratories, and other organizations to investigate the technical and institutional feasibility of subseabed disposal.

(B) The Subseabed Consortium shall develop a research plan and budget to achieve the following objectives by 1995:

(i) demonstrate the capacity to identify and characterize potential subseabed disposal sites;

(ii) develop conceptual designs for a subseabed disposal system, including estimated costs and institutional requirements; and

(iii) identify and assess the potential impacts of subseabed disposal on the human and marine environment.

(C) In 1990, and again in 1995, the Subseabed Consortium shall report to Congress on the progress being made in achieving the objectives of paragraph (2).

(5) The Director of the Office of Subseabed Disposal research shall annually prepare and submit a report to the Congress on the activities and expenditures of the Office.

(Pub. L. 97-425, title II, § 224, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5063, Dec. 22, 1987, 101 Stat. 1330-253.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SUBCHAPTER III – OTHER PROVISIONS RELATING TO RADIOACTIVE WASTE

§ 10221. Mission plan

(a) Contents of mission plan

The Secretary shall prepare a comprehensive report, to be known as the mission plan, which shall provide an informational basis sufficient to permit informed decisions to be made in carrying out the repository program and the research, development, and demonstration programs required under this chapter. The mission plan shall include –

(1) an identification of the primary scientific, engineering, and technical information, including any necessary demonstration of engineering or systems integration, with respect to the siting and construction of a test and evaluation facility and repositories;

(2) an identification of any information described in paragraph (1) that is not available because of any unresolved scientific, engineering, or technical questions , or undemonstrated engineering or systems integration, a schedule including specific major milestones for the research, development, and technology demonstration program required under this chapter and any additional activities to be undertaken to provide such information, a schedule for the activities necessary to achieve important programmatic milestones, and an estimate of the costs required to carry out such research, development, and demonstration programs;

(3) an evaluation of financial, political, legal, or institutional problems that may impede the implementation of this chapter, the plans of the Secretary to resolve such problems, and recommendations for any necessary legislation to resolve such problems;

(4) any comments of the Secretary with respect to the purpose and program of the test and evaluation facility;

(5) a discussion of the significant results of research and development programs conducted and the implications for each of the different geologic media under consideration for the siting of repositories, and, on the basis of such information, a comparison of the advantages

and disadvantages associated with the use of such media for repository sites;

(6) the guidelines issued under section 10132(a) of this title;

(7) a description of known sites at which site characterization activities should be undertaken, a description of such siting characterization activities, including the extent of planned excavations, plans for onsite testing with radioactive or nonradioactive material, plans for any investigations activities which may affect the capability of any such site to isolate high-level radioactive waste or spent nuclear fuel, plans to control any adverse, safety-related impacts from such site characterization activities, and plans for the decontamination and decommissioning of such site if it is determined unsuitable for licensing as a repository;

(8) an identification of the process for solidifying high-level radioactive waste or packaging spent nuclear fuel, including a summary and analysis of the data to support the selection of the solidification process and packaging techniques, an analysis of the requirements for the number of solidification packaging facilities needed, a description of the state of the art for the materials proposed to be used in packaging such waste or spent fuel and the availability of such materials including impacts on strategic supplies and any requirements for new or reactivated facilities to produce any such materials needed, and a description of a plan, and the schedule for implementing such plan, for an aggressive research and development program to provide when needed a high-integrity disposal package at a reasonable price;

(9) an estimate of (A) the total repository capacity required to safely accommodate the disposal of all high-level radioactive waste and spent nuclear fuel expected to be generated through December 31, 2020, in the event that no commercial reprocessing of spent nuclear fuel occurs, as well as the repository capacity that will be required if such reprocessing does occur; (B) the number and type of repositories required to be constructed to provide such disposal capacity; (C) a schedule for the construction of such repositories; and (D) an estimate of the period during which each repository listed in such schedule will be accepting high-level radioactive waste or spent nuclear fuel for disposal;

(10) an estimate, on an annual basis, of the costs required (A) to construct and operate the repositories anticipated to be needed under paragraph (9) based on each of the assumptions referred to in such paragraph; (B) to construct and operate a test and evaluation facility, or any other facilities, other than repositories described in subparagraph (A), determined to be necessary; and (C) to carry out any other activities under this chapter; and

(11) an identification of the possible adverse economic and other impacts to the State or Indian tribe involved that may arise from the development of a test and evaluation facility or repository at a site.

(b) Submission of mission plan

(1) Not later than 15 months after January 7, 1983, the Secretary shall submit a draft mission plan to the

States, the affected Indian tribes, the Commission, and other Government agencies as the Secretary deems appropriate for their comments.

(2) In preparing any comments on the mission plan, such agencies shall specify with precision any objections that they may have. Upon submission of the mission plan to such agencies, the Secretary shall publish a notice in the Federal Register of the submission of the mission plan and of its availability for public inspection, and, upon receipt of any comments of such agencies respecting the mission plan, the Secretary shall publish a notice in the Federal Register of the receipt of comments and of the availability of the comments for public inspection. If the Secretary does not revise the mission plan to meet objections specified in such comments, the Secretary shall publish in the Federal Register a detailed statement for not so revising the mission plan.

(3) The Secretary, after reviewing any other comments made by such agencies and revising the mission plan to the extent that the Secretary may consider to be appropriate, shall submit the mission plan to the appropriate committees of the Congress not later than 17 months after January 7, 1983. The mission plan shall be used by the Secretary at the end of the first period of 30 calendar days (not including any day on which either House of Congress is not in session because of adjournment of more than 3 calendar days to a day certain) following receipt of the mission plan by the Congress.

(Pub. L. 97-425, title III, § 301, Jan. 7, 1983, 96 Stat. 2255.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10196, 10197 of this title.

§ 10222. Nuclear Waste Fund

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering

such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section.[1] In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose an adjustment to the fee to insure full costs recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the

procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that –

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.[1]

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless –

(i) such person has entered into a contract with the Secretary under this section; or

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[1] See References in Text note below.

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than –

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United

States referred to in section 101 or 102 of title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfer to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) Establishment of Nuclear Waste Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of –

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e) of this section, which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (e) of this section, only for

purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including –

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored,[2] retrievable storage facility[3] or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored,[2] retrievable storage site[3] or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored,[2] retrievable storage site[3] or a test and evaluation facility site and necessary or incident to such repository monitored,[2] retrievable storage facility[3] or test and evaluation facility; and

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[2] So in original. The comma probably should not appear.

[3] So in original. Probably should be followed by a comma.

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter[4] for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

(e) Administration of Waste Fund

(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste

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[4] See References in Text note below.

Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States –

> (A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and
>
> (B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of title 31.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter,[5] the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities,

and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such Act[5] are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such

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[5] See References in Text note below.

interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

(Pub. L. 97-425, title III, § 302, Jan. 7, 1983, 96 Stat. 2257.)

References in Text

Subsection (c) of this section, referred to in subsec. (a)(3), was in the original "subsection (c) 126(b)" and was translated as subsection (c) of this section as the probable intent of Congress in view of the establishment of the Nuclear Waste Fund by subsec. (c) of this section and the absence of a section 126 in Pub. L. 97-425.

This subchapter, referred to in subsecs. (a)(5)(B), (d), and (e)(5), was in the original "this subtitle", and was translated as this subchapter to reflect the probable intent of Congress because title III of Pub. L. 97-425, which enacted this subchapter, does not contain subtitles.

Such Act, referred to in subsec. (e)(5), probably means chapter 31 of Title 31 Money and Finance.

Section Referred to in Other Sections

This section is referred to in sections 2210, 10101, 10107, 10138, 10161, 10193, 10194, 10251, 10269 of this title.

§ 10223. Alternative means of financing

The Secretary shall undertake a study with respect to alternative approaches to managing the construction and operation of all civilian radioactive waste management facilities, including the feasibility of establishing a private corporation for such purposes. In conducting such study, the Secretary shall consult with the Director of the Office of Management and Budget, the Chairman of the Commission, and such other Federal agency representatives as may be appropriate. Such study shall be completed, and a report containing the results of such study shall be submitted to the Congress, within 1 year after January 7, 1983.

(Pub. L. 97-425, title III, § 303, Jan. 7, 1983, 96 Stat. 2261.)

§ 10224. Office of Civilian Radioactive Waste Management

(a) Establishment

There hereby is established within the Department of Energy an Office of Civilian Radioactive Waste Management. The Office shall be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate payable for level IV of the Executive Schedule under section 5315 of title 5.

(b) Functions of Director

The Director of the Office shall be responsible for carrying out the functions of the Secretary under this

chapter, subject to the general supervision of the Secretary. The Director of the Office shall be directly responsible to the Secretary.

(c) Annual report to Congress

The Director of the Office shall annually prepare and submit to the Congress a comprehensive report on the activities and expenditures of the Office.

(d) Annual audit by Comptroller General

The Comptroller General of the United States shall annually make an audit of the Office, in accordance with such regulations as the Comptroller General may prescribe. The Comptroller General shall have access to such books, records, accounts, and other materials of the Office as the Comptroller General determines to be necessary for the preparation of such audit. The Comptroller General shall submit to the Congress a report on the results of each audit conducted under this section.

(Pub. L. 97-425, title III, § 304, Jan. 7, 1983, 96 Stat. 2261.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10101 of this title.

§ 10225. Location of test and evaluation facility

(a) Report to Congress

Not later than 1 year after January 7, 1983, the Secretary shall transmit to the Congress a report setting forth

whether the Secretary plans to locate the test and evaluation facility at the site of a repository.

(b) Procedures

(1) If the test and evaluation facility is to be located at any candidate site or repository site (A) site selection and development of such facility shall be conducted in accordance with the procedures and requirements established in subchapter I of this chapter with respect to the site selection and development of repositories; and (B) the Secretary may not commence construction of any surface facility for such test and evaluation facility prior to issuance by the Commission of a construction authorization for a repository at the site involved.

(2) No test and evaluation facility may be converted into a repository unless site selection and development of such facility was conducted in accordance with the procedures and requirements established in subchapter I of this chapter with respect to the site selection and development of repositories.[6]

(3) The Secretary may not commence construction of a test and evaluation facility at a candidate site or site recommended as the location for a repository prior to the date on which the designation of such site is effective under section 10135 of this title.

(Pub. L. 97-425, title III, § 305, Jan. 7, 1983, 96 Stat. 2262.)

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[6] So in original. Probably should be "repositories."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10132, 10197 of this title.

§ 10226. Nuclear Regulatory Commission training authorization

The Nuclear Regulatory Commission is authorized and directed to promulgate regulations, or other appropriate Commission regulatory guidance, for the training and qualifications of civilian nuclear powerplant operators, supervisors, technicians and other appropriate operating personnel. Such regulations or guidance shall establish simulator training requirements for applicants for civilian nuclear powerplant operator licenses and for operator requalification programs; requirements governing NRC administration of requalification examinations; requirements for operating tests at civilian nuclear powerplant simulators, and instructional requirements for civilian nuclear powerplant licensee personnel training programs. Such regulations or other regulatory guidance shall be promulgated by the Commission within the 12-month period following January 7, 1983, and the Commission within the 12-month period following January 7, 1983, shall submit a report to Congress setting forth the actions the Commission has taken with respect to fulfilling its obligations under this section.

(Pub. L. 97-425, title III, § 306, Jan. 7, 1983, 96 Stat. 2262.)

SUBCHAPTER IV – NUCLEAR WASTE NEGOTIATOR

Subchapter Referred to in Other Sections

This subchapter is referred to in sections 10101, 10136 of this title.

§ 10241. "State" defined

For purpose of this subchapter, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, any other territory or possession of the United States, and the Republic of the Marshall Islands.

(Pub. L. 97-425, title IV, § 401, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-243.)

Codification

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10242. Office of the Nuclear Waste Negotiator

(a) Establishment

There is established the Office of the Nuclear Waste Negotiator that shall be an independent establishment in the executive branch.

(b) Nuclear Waste Negotiator

(1) The Office shall be headed by a Nuclear Waste Negotiator who shall be appointed by the President, by and with the advice and consent of the Senate. The Negotiator shall hold office at the pleasure of the President, and shall be compensated at the rate provided for level III of the Executive Schedule in section 5314 of title 5.

(2) The Negotiator shall attempt to find a State or Indian tribe willing to host a repository or monitored retrievable storage facility at a technically qualified site on reasonable terms and shall negotiate with any State or Indian tribe which expresses an interest in hosting a repository or monitored retrievable storage facility.

(Pub. L. 97-425, title IV, § 402, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-243; Pub. L. 100-507, § 1, Oct. 18, 1988, 102 Stat. 2541.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

AMENDMENTS

1988 – Subsec. (a). Pub. L. 100-507 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: "There is established within the Executive Office of the President the Office of the Nuclear Waste Negotiator."

§ 10243. Duties of Negotiator

(a) Negotiations with potential hosts

(1) The Negotiator shall –

(A) seek to enter into negotiations on behalf of the United States, with –

(i) the Governor of any State in which a potential site is located; and

(ii) the governing body of any Indian tribe on whose reservation a potential site is located; and

(B) attempt to reach a proposed agreement between the United States and any such State or Indian tribe specifying the terms and conditions under which such State or tribe would agree to host a repository or monitored retrievable storage facility within such State or reservation.

(2) In any case in which State law authorizes any person or entity other than the Governor to negotiate a proposed agreement under this section on behalf of the State, any reference in this subchapter to the Governor shall be considered to refer instead to such other person or entity.

(b) Consultation with affected States, subdivisions of States, and tribes

In addition to entering into negotiations under subsection (a) of this section, the Negotiator shall consult with any State, affected unit of local government, or any Indian tribe that the Negotiator determines may be affected by the siting of a repository or monitored retrievable storage facility and may include in any proposed

agreement such terms and conditions relating to the interest of such States, affected units of local government, or Indian tribes as the Negotiator determines to be reasonable and appropriate.

(c) Consultation with other Federal agencies

The Negotiator may solicit and consider the comments of the Secretary, the Nuclear Regulatory Commission, or any other Federal agency on the suitability of any potential site for site characterization. Nothing in this subsection shall be construed to require the Secretary, the Nuclear Regulatory Commission, or any other Federal agency to make a finding that any such site is suitable for site characterization.

(d) Proposed agreement

(1) The Negotiator shall submit to the Congress any proposed agreement between the United States and a State or Indian tribe negotiated under subsection (a) of this section and an environmental assessment prepared under section 10244(a) of this title for the site concerned.

(2) Any such proposed agreement shall contain such terms and conditions (including such financial and institutional arrangements) as the Negotiator and the host State or Indian tribe determine to be reasonable and appropriate and shall contain such provisions as are necessary to preserve any right to participation or compensation of such State, affected unit of local government, or Indian tribe unit of local government, or Indian tribe under sections 10136(c), 10137, and 10138(b) of this title.

(3)(A) No proposed agreement entered into under this section shall have legal effect unless enacted into Federal law.

(B) A State or Indian tribe shall enter into an agreement under this section in accordance with the laws of such State or tribe. Nothing in this section may be construed to prohibit the disapproval of a proposed agreement between a State and the United States under this section by a referendum or an act of the legislature of such State.

(4) Notwithstanding any proposed agreement under this section, the Secretary may construct a repository or monitored retrievable storage facility at a site agreed to under this subchapter only if authorized by the Nuclear Regulatory Commission in accordance with the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], title II of the Energy Reorganization Act of 1982 (42 U.S.C. 5841 et seq.) and any other law applicable to authorization of such construction.

(Pub. L. 97-425, title IV, § 403, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-244.)

REFERENCE IN TEXT

The Atomic Energy Act of 1954, referred to in subsec. (d)(4), is act Aug. 30, 1954, ch. 1073, 68 Stat. 921, as amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Energy Reorganization Act of 1982, referred to in subsec. (d)(4), probably means the Energy Reorganization Act of 1974, Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233, as amended. Title II of the Energy Reorganization Act of 1974 is classified generally to subchapter II (§ 5841 et seq.) of chapter 73 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5801 of this title and Tables.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 10244, 10245, 10246 of this title.

§ 10244. Environmental assessment of sites

(a) In general

Upon the request of the Negotiator, the Secretary shall prepare an environmental assessment of any site that is the subject of negotiations under section 10243(a) of this title.

(b) Contents

(1) Each environmental assessment prepared for a repository site shall include a detailed statement of the probable impacts of characterizing such site and the construction and operation of a repository at such site.

(2) Each environmental assessment prepared for a monitored retrievable storage facility site shall include a

detailed statement of the probable impacts of construction and operation of such a facility at such site.

(c) Judicial review

The issuance of an environmental assessment under subsection (a) of this section shall be considered to be a final agency action subject to judicial review in accordance with the provisions of chapter 7 of title 5 and section 10139 of this title.

(d) Public hearings

(1) In preparing an environmental assessment for any repository or monitored retrievable storage facility site, the Secretary shall hold public hearings in the vicinity of such site to inform the residents of the area in which such site is located that such site is being considered and to receive their comments.

(2) At such hearings, the Secretary shall solicit and receive any recommendations of such residents with respect to issues that should be addressed in the environmental assessment required under subsection (a) of this section and the site characterization plan described in section 10133(b)(1) of this title.

(e) Public availability

Each environmental assessment prepared under subsection (a) of this section shall be made available to the public.

(f) Evaluation of sites

(1) In preparing an environmental assessment under subsection (a) of this section, the Secretary shall use available geophysical, geologic, geochemical and hydrologic, and other information and shall not conduct any preliminary borings or excavations at any site that is the subject of such assessment unless –

> (A) such preliminary boring or excavation activities were in progress on or before December 22, 1987; or
>
> (B) the Secretary certifies that, in the absence of preliminary borings or excavations, adequate information will not be available to satisfy the requirements of this chapter or any other law.

(2) No preliminary boring or excavation conducted under this section shall exceed a diameter of 40 inches.

(Pub. L. 97-425, title IV, § 404, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V. § 5041, Dec. 22, 1987, 101 Stat. 1330-245.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10243 of this title.

§ 10245. Site characterization; licensing

(a) Site characterization

Upon enactment of legislation to implement an agreement to site a repository negotiated under section 10243(a) of this title, the Secretary shall conduct appropriate site characterization activities for the site that is the subject of such agreement. Any such site characterization activities shall be conducted in accordance with section 10133 of this title, except that references in such section to the Yucca Mountain site and the State of Nevada shall be deemed to refer to this site that is the subject of the agreement and the State or Indian tribe entering into the agreement.

(b) Licensing

(1) Upon the completion of site characterization activities carried out under subsection (a) of this section, the Secretary shall submit to the Nuclear Regulatory Commission an application for construction authorization for a repository at such site.

(2) The Nuclear Regulatory Commission shall consider an application for a construction authorization for a repository or monitored retrievable storage facility in accordance with the laws applicable to such applications, except that the Nuclear Regulatory Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than 3 years after the date of the submission of such application.

(Pub. L. 97-425, title IV, § 405, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104,

1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-246.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10247 of this title.

§ 10246 Monitored retrievable storage

(a) Construction and operation

Upon enactment of legislation to implement an agreement negotiated under section 10243(a) of this title to site a monitored retrievably storage facility, the Secretary shall construct and operate such facility as part of an integrated nuclear waste management system in accordance with the terms and conditions of such agreement.

(b) Financial assistance

The Secretary may make grants to any State, Indian tribe, or affected unit of local government to assess the feasibility of siting a monitored retrievable storage facility under this section at a site under the jurisdiction of such State, tribe, or affected unit of local government.

(Pub. L. 97-425, title IV, § 406, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-246.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10247. Environmental impact statement

(a) In general

Issuance of a construction authorization for a repository or monitored retrievable storage facility under section 10245(b) of this title shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(b) Preparation

A final environmental impact statement shall be prepared by the Secretary under such Act and shall accompany any application to the Nuclear Regulatory Commission for a construction authorization.

(c) Adoption

(1) Any such environmental impact statement shall, to the extent practicable, be adopted by the Nuclear Regulatory Commission, in accordance with section 1506.3 of title 40, Code of Federal Regulations, in connection with the issuance by the Nuclear Regulatory Commission of a construction authorization and license for such repository or monitored retrievable storage facility.

(2)(A) In any such statement prepared with respect to a repository to be constructed under this subchapter at

the Yucca Mountain site, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or nongeologic alternatives to such site.

(B) In any such statement prepared with respect to a repository to be constructed under this subchapter at a site other than the Yucca Mountain site, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, or nongeologic alternatives to such site but shall consider the Yucca Mountain site as an alternate to such site in the preparation of such statement.

(Pub. L. 97-425, title IV, § 407, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-246.)

References in Text

The National Environmental Policy Act of 1969, referred to in subsecs. (a) and (b), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

Codification

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10248. Administrative powers of Negotiators

In carrying out his functions under this subchapter, the Negotiator may –

(1) appoint such officers and employees as he determines to be necessary and prescribe their duties;

(2) obtain services as authorized by section 3109 of title 5, at rates not to exceed the rate prescribed for grade GS-18 of the General Schedule by section 5332 of title 5;

(3) promulgate such rules and regulations as may be necessary to carry out such functions;

(4) utilize the services, personnel, and facilities of other Federal agencies (subject to the consent of the head of any such agency);

(5) for purposes of performing administrative functions under this subchapter, and to the extent funds are appropriated, enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary and on such terms as the Negotiator determines to be appropriate, with any agency or instrumentality of the United States, or with any public or private person or entity;

(6) accept voluntary and uncompensated services, notwithstanding the provisions of section 1342 of title 41;

(7) adopt an official seal, which shall be judicially noticed;

(8) use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States;

(9) hold such hearings as are necessary to determine the views of interested parties and the general public; and

(10) appoint advisory committees under the Federal Advisory Committee Act (5 U.S.C. App.).

(Pub. L. 97-425, title IV, § 408, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-247.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in par. (10), is Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10249. Cooperation of other departments and agencies

Each department, agency, and instrumentality of the United States, including any independent agency, may furnish the Negotiator such information as he determines to be necessary to carry out his functions under this subchapter.

(Pub. L. 97-425, title IV, § 409, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104,

1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-247.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10250. Termination of Office

The Office shall cease to exist not later than 30 days after the date 5 years after December 22, 1987.

(Pub. L. 97-425, title IV, § 410, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203 title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-247.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10251. Authorization of appropriations

Notwithstanding subsection (d) of section 10222 of this title, and subject to subsection (e) of such section, there are authorized to be appropriated for expenditures from amounts in the Waste Fund established in subsection (c) of such section, such sums as may be necessary to carry out the provisions of this subchapter.

(Pub. L. 97-425, title IV, § 411, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104,

1329-121; Pub. L. 100-203, title V, § 5041, Dec. 22, 1987, 101 Stat. 1330-248.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SUBCHAPTER V – NUCLEAR WASTE TECHNICAL REVIEW BOARD

§ 10261. Definitions

As used in this subchapter:

(1) The term "Chairman" means the Chairman of the Nuclear Waste Technical Review Board.

(2) The term "Board" means the Nuclear Waste Technical Review Board established under section 10262 of this title.

(Pub. L. 97-425, title V, § 501, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V. § 5051, Dec. 22, 1987, 101 Stat. 1330-248.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10262. Nuclear Waste Technical Review board

(a) Establishment

There is established a Nuclear Waste Technical Review Board that shall be an independent establishment within the executive branch.

(b) Members

(1) The Board shall consist of 11 members who shall be appointed by the President not later than 90 days after December 22, 1987, from among persons nominated by the National Academy of Sciences in accordance with paragraph (3).

(2) The President shall designate a member of the Board to serve as chairman.

(3)(A) The National Academy of Sciences shall, not later than 90 days after December 22, 1987, nominate not less than 22 persons for appointment to the Board from among persons who meet the qualifications described in subparagraph (C).

(B) The National Academy of Sciences shall nominate not less than 2 persons to fill any vacancy on the Board from among persons who meet the qualifications described in subparagraph (C).

(C)(i) Each person nominated for appointment to the Board shall be –

(I) eminent in a field of science or engineering, including environmental sciences; and

(II) selected solely on the basis of established records of distinguished service.

(ii) The membership of the Board shall be representative of the broad range of scientific and engineering disciplines related to activities under this subchapter.

(iii) No person shall be nominated for appointment to the Board who is an employee of –

(I) the Department of Energy;

(II) a national laboratory under contract with the Department of Energy; or

(III) an entity performing in high-level radio-active waste or spent nuclear fuel activities under contract with the Department of Energy.

(4) Any vacancy on the Board shall be filled by the nomination and appointment process described in paragraphs (1) and (3).

(5) Members of the Board shall be appointed for terms of 4 years, each such term to commence 120 days after December 22, 1987, except that of the 11 members first appointed to the Board, 5 shall serve for 2 years and 6 shall serve for 4 years, to be designated by the President at the time of appointment.

(Pub. L. 97-425, title V, § 502, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22 1987, 101 Stat. 1330-248.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 10261 of this title.

§ 10263. Functions

The Board shall evaluate the technical and scientific validity of activities undertaken by the Secretary after December 22, 1987, including –

(1) site characterization activities, and

(2) activities relating to the packaging or transportation of high-level radioactive waste or spent nuclear fuel.

(Pub. L. 97-425, title V, § 503, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22, 1987, 101 Stat. 1330-249.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10264. Investigatory powers

(a) Hearings

Upon request of the Chairman or a majority of the members of the board, the Board may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Board considers appropriate. Any member of the Board may administer oaths or affirmations to witnesses appearing before the Board.

(b) Production of documents

(1) Upon the request of the Chairman or a majority of the members of the Board, and subject to existing law, the Secretary (or any contractor of the Secretary) shall provide the Board with such records, files, papers, data, or information as may be necessary to respond to any inquiry of the Board under this subchapter.

(2) Subject to existing law, information obtainable under paragraph (1) shall not be limited to final work products of the Secretary, but shall include drafts of such products and documentation of work in progress.

(Pub. L. 97-425, title V. § 504, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22, 1987, 101 Stat. 1330-249.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10265. Compensation of members

(a) In general

Each member of the Board shall be paid at the rate of pay payable for level III of the Executive Schedule for each day (including travel time) such member is engaged in the work of the Board.

(b) Travel expenses

Each member of the Board may receive travel expenses, including per diem in lieu of subsistence, in the same manner as is permitted under sections 5702 and 5703 of title 5.

(Pub. L. 97-425, title V, § 505, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22, 1987, 101 Stat. 1330-249.)

REFERENCES IN TEXT

Level III of the Executive Schedule, referred to in subsec. (a), is set out in section 5314 of Title 5, Government Organization and Employees.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10266. Staff

(a) Clerical staff

(1) Subject to paragraph (2), the Chairman may appoint and fix the compensation of such clerical staff as may be necessary to discharge the responsibilities of the Board.

(2) Clerical staff shall be appointed subject to the provisions of title 5 governing appointments in the competitive service, and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53

of such title relating to classification and General Schedule pay rates.

(b) Professional staff

(1) Subject to paragraphs (2) and (3), the chairman may appoint and fix the compensation of such professional staff as may be necessary to discharge the responsibilities of the Board.

(2) Not more than 10 professional staff members may be appointed under this subsection.

(3) Professional staff members may be appointed without regard to the provisions of title 5 governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

(Pub. L. 97-425, title V, § 506, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22, 1987, 101 Stat. 1330-249.)

REFERENCES IN TEXT

The provisions of title 5 governing appointments in the competitive service, referred to in subsecs. (a)(2) and (b)(3), are classified generally to section 3301 et seq. of Title 5, Government Organization and Employees.

The General Schedule, referred to in subsec. (b)(3), is set out under section 5332 of Title 5.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10267. Support services

(a) General services

To the extent permitted by law and requested by the Chairman, the Administrator of General Services shall provide the Board with necessary administrative services, facilities, and support on a reimbursable basis.

(b) Accounting, research, and technology assessment services

The Comptroller General, the Librarian of Congress, and the Director of the Office of Technology Assessment shall, to the extent permitted by law and subject to availability of funds, provide the Board with such facilities, support, funds and services, including staff, as may be necessary for the effective performance of the functions of the Board.

(c) Additional support

Upon the request of the Chairman, the Board may secure directly from the head of any department or agency of the United States information necessary to enable it to carry out this subchapter.

(d) Mails

The Board may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

(e) Experts and consultants

Subject to such rules as may be prescribed by the Board, the Chairman may procure temporary and intermittent services under section 3109(b) of title 5, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(Pub. L. 97-425, title V, § 507, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22, 1987, 101 Stat. 1330-250.)

REFERENCES IN TEXT

The General Schedule, referred to in subsec. (e), is set out under section 5332 of Title 5, Government Organization and Employees.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10268. Report

The Board shall report not less than 2 times per year to Congress and the Secretary its findings, conclusions,

and recommendations. The first such report shall be submitted not later than 12 months after December 22, 1987.

(Pub. L. 97-425, title V, § 508, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22, 1987, 101 Stat. 1330-250.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10269. Authorization of appropriations

Notwithstanding subsection (d) of section 10222 of this title, and subject to subsection (e) of such section, there are authorized to be appropriated for expenditures from amounts in the Waste Fund established in subsection (c) of such section such sums as may be necessary to carry out the provisions of this subchapter.

(Pub. L. 97-425, title V, § 509, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22, 1987, 101 Stat. 1330-251.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

§ 10270. Termination of Board

The Board shall cease to exist not later than 1 year after the date on which the Secretary begins disposal of high-level radioactive waste or spent nuclear fuel in a repository.

(Pub. L. 97-425, title V, § 510, as added Pub. L. 100-202, § 101(d) [title III], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5051, Dec. 22, 1987, 101 Stat. 1330-251.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

(SEAL)

APPENDIX C

Department of Energy

Idaho Operations Office
785 DOE Place
Idaho Falls, Idaho 83402

February 13, 1990

Jonathan P. Carter, Legal Counsel
Office of the Governor
State Capitol
Boise, Idaho 83720

Re: Information Requested by Telephone and in November 17, 1989, Letter

Dear Mr. Carter:

Pursuant to your November 17, 1989, letter, "Re: Request for DOE Documents" and our subsequent telephone conversations, I am providing you with this additional information.

Responses to the three numbered paragraphs in your November 17, 1989, letter are set forth below in order:

1. Enclosed is the Environmental Survey Preliminary Report, Idaho National Engineering Laboratory (INEL), Idaho Falls, Idaho, and Component Development and Integration Facility (CDIF), Butte, Montana, dated September 1988 (DOE/EH/OEV-22-P). This report presents the preliminary findings of the first phase of the Environmental Survey of the INEL and the CDIF, conducted September 14 – October 2, 1987, by a team led and managed by the Office of Environmental Audit. The purpose of the DOE's environmental survey effort, of which the INEL

and CDIF survey is a part, is to identify environmental problems at DOE's operating facilities and to prioritize the problems for correction.

Please note the preliminary nature of the report which does not include the results of survey-related sampling and analysis and which is based on further review for factual accuracy. This report was provided to Mr. Richard P. Donovan, Director, Idaho Department of Health and Welfare by letter dated November 18, 1988. Numerous members of Congress were also provided a copy. The action plan responding to the findings and recommendations was also provided to Mr. Donovan at that time. I am providing you with the most current version of the action plan. The action plan will be updated in the future to reflect progress in resolution of action items. Please note that the Environmental Survey Preliminary Report contains only preliminary findings. A subsequent report, the Environmental Survey Summary Report, will contain the final findings. I am also including the Data Accuracy Review Memorandum for the INEL, which indicates the progress made to date toward identifying necessary corrections and the issuance of the Environmental Survey Summary Report.

Some additional materials which may be responsive to your inquiry were called to my attention recently. I should be in a position to respond concerning these very shortly.

2. The NEPA documents requested in this paragraph were transmitted by my previous letter dated December 19, 1989.

3. Your question implies that the NFS Transportable Cask Storage Project may have been addressed in the West Valley Demonstration Project (WVDP) Environmental Impact Statement (EIS). The NFS Transportable Storage Cask Project is not a part of the West Valley Demonstration Project, but is funded under the waste funds set up by the Nuclear Waste Policy Act of 1982, administered by DOE's Office of Civil Radioactive Waste Management. DOE-ID is responsible for the Cask Systems Development Program (CSDP) for OCRWM and we are developing a variety of casks for transportation and temporary storage of commercial nuclear power plant spent fuel. The NFS Project conducted by DOE-ID CSDP will demonstrate the technical and operational features of a dual purpose dry storage/transportation cask and facilitate commercialization of such casks. A more complete description of the relationship of this project to the WVDP follows.

   DOE has complied with the requirements of NEPA as they relate to the mandates of the WVDP Act. DOE published a Final Environmental Impact Statement (FEIS) in June of 1982 (DOE/EIS/0081), "Final Environment Impact Statement – Long-Term Management of Liquid High-Level Radioactive Waste Stored in the Western New York Nuclear Service Center, West Valley." The FEIS assessed the environmental impacts of the

alternatives for long term management of the estimated 600,000 gallons of high level liquid radioactive waste stored in underground steel tanks at the Western New York Nuclear Services Center (Center). Although DOE's post solidification responsibilities were reviewed by the 1982 FEIS in general, detailed review and subsequent implementation decisions were deferred until more technical information was available and major institutional issues were wholly or partially resolved. DOE has issued a Notice of Intent (enclosed) to prepare an Environmental Impact Statement to cover WVDP completion (including decontamination and decommissioning of the facilities and transportation of the estimated 300 borosilicate glass logs resulting from the solidification project to a federal repository). Since the legislative history of the WVDP Act was clear that DOE was to utilize existing facilities located at the Center in the Project, the Cooperative Agreement entered into by DOE and NYSERDA made available, without transfer of title, approximately 200 acres of the Center which included the former reprocessing facilities. This facility complex included a nuclear fuel receiving and storage area (FRS). When DOE assumed possession of the property in 1982, the FRS had stored nuclear fuel and associated contaminated reactor hardware owned by various utilities and NFS. As between DOE and NYSERDA, at that time NYSERDA was responsible for the removal of the nuclear fuel stored in the FRS. However, DOE planned to use the FRS for storage, size

reduction, and decontamination of equipment and material associated with the conduct of the WVDP. Under the terms of the Cooperative Agreement, the DOE permitted NYSERDA to continue to store the fuel at the FRS until it could be removed. However, DOE, in connection with its responsibility for operation and maintenance of the FRS, acted as NYSERDA's agent for the management, maintenance and surveillance of the irradiated nuclear fuel elements stored in the FRS. The spent fuel belonging to the utilities has been removed pursuant to an Order issued April 8, 1983, of the United States District Court for the Western District of New York, as a result of a settlement in litigation between the utilities and NYSERDA.

As discussed with you in my previous correspondence, DOE decided to utilize the remaining NFS fuel in a research and demonstration project pursuant to the provisions of the Nuclear Waste Policy Act of 1982. DOE entered into this contract for the purpose of carrying out a project to develop and demonstrate dual-use shipping and dry storage casks for nuclear fuel. Pursuant to Modification No. 1 of the NFS DOE contract (previously supplied to you, Contract No. DE-AC07-84ID12505) DOE has taken title to and responsibility for removal of the NFS spent nuclear fuel. This project is not a part of the WVDP, however. Since the state of New York is responsible for ten percent (10%) of all WVDP costs, DOE's agreement with the NYSERDA permitting the NFS fuel to remain in the FRS pending removal to the

> INEL have very explicit provisions which prevented any cost responsibility being allocated to the WVDP for what is identified in the agreement as the Shipping and Storage Cask Demonstration Project. As stated on pages 4 and 5 of the agreement, previously supplied to you, "all costs and expenses incurred by US DOE . . . in connection with the Shipping and Storage Cask Demonstration Project . . . [must be] properly allocated and treated as costs and expenses of the Shipping and Storage Cask Demonstration Project, not the WVDP, and are the responsibility of US DOE as non-WVDP costs and expenses. . . . "
>
> Therefore NEPA documentation relating to the Cask Project is not included in the WVDP.
>
> DOE is currently reviewing documentation necessary for the shipping and storage cask demonstration project. A final determination on the appropriate level of environmental documentation will be forthcoming in the near future.

You also requested copies of additional materials, in the body of your letter. I am providing to you a copy of Secretary Watkins' August 7, 1989, letter concerning NEPA compliance at the INEL and I am also providing you with the reply memorandum dated September 14, 1989, from Don Ofte. I am not providing you with the attachments to the September 14, 1989, memorandum. I am not at this time in a position to provide you with the other requested documents since they are predecisional drafts. Providing you these deliberative documents may

cause significant injury to the quality of DOE decision-making processes. Prematurely disclosing these documents would discourage open, frank discussions on important matters of policy and self criticism amongst subordinates and superiors. Public confusion might result from premature disclosure of tentative, preliminary reasons and rationales that may not, in fact, be correct, complete, or ultimately be the grounds for the DOE's decisions.

You also expressed concern about the August 1989, Environmental Compliance Manual not incorporating specific requirements of the CEQ regulations governing implementation of NEPA. This manual is under considerable revision at this time. The emphasis on this draft was explaining DOE's internal, additional NEPA procedures, including environmental checklists and memorandums to file. It is not felt important to incorporate public participation provisions that are already discussed in detail in the CEQ regulations. This DOE-ID manual is considered supplemental and is not intended to contradict the CEQ regulations or the DOE regulations on NEPA compliance.

You questioned the status of the plans to reprocess Ft. St. Vrain (FSV) fuel at the INEL. DOE-ID has customarily planned specific schedules for reprocessing over an approximate twelve year period. Specific fuel types are accumulated until reprocessing is economical and efficient. Head-end processes have been developed for several different kinds of fuels, including stainless steel, zirconium, aluminum, graphite and others. However, it has not been deemed necessary to firm up or evaluate in detail tentative plans for reprocessing FSV fuel because of

significant delays in its receipt. The Irradiated Fuel Storage Facility (IFSF), where the FSV fuel is to be stored and which contains the first three segments of that fuel at this time, has been used to store the other graphite fuel prior to its reprocessing. DOE-ID's experience with reprocessing graphite fuel provides a good data base for planning FSV fuel reprocessing.

The FSV fuel and its reprocessing provide opportunities to contribute significantly to the high temperature gas reactor (HTGR) programs in the DOE. This option for reprocessing the FSV fuel would take advantage of existing reprocessing capabilities at the Idaho Chemical Processing Plant (ICPP) with little or virtually no increase in either waste calcine volume or the number of high-level waste canisters sent to a federal repository. In addition to reprocessing, DOE is continuing to evaluate the benefits that other types of testing and examination of the Ft. St. Vrain fuel would provide to the DOE complex and the HTGR program in general.

The most pressing research and development need for this fuel is information for the New Production Reactor-Modular HTGR (NPR-MHTGR) program. At this time, the NPR-MHTGR program estimates that ten to twenty percent of the FSV fuel blocks will be examined or utilized in testing. Information/data obtained from the examination, testing, and analysis of the blocks will be used to support MHTGR technology activities. The extent of the examination will range from physical examination and the full-scale post-irradiation examination, to destructive testing to obtain data to support process development for fuel and target reprocessing and recovery. The information obtained from the FSV fuel will help

to minimize the time and cost of some NPR-MHTGR development activities and would be a source of data to support fuels and graphite data bases. Specific examples include the following:

1. H451 Graphite Test Blocks. There are some H451 graphite test fuel blocks which have seen reactor service. Since this is the type of graphite that will be used in the NPR-MHTGR, data needs to be obtained on performance and fission product transport through the material.

2. Fuel Performance. Although the FSV fuel is different from the NPR-MHTGR fuel in some respects, information gained from the fuel will be helpful to determine fission product transport and defect fraction of the fuel particles that have seen reactor service.

3. Development of Fuel Reprocessing Head End Process. Currently, the reprocessing of spent NPR fuel is planned. Engineering studies to optimize the crushing and grinding processes of the fuel components would be performed on some of the FSV fuel.

4. Carbon 14 Studies. At this time incineration of the graphite blocks and the fuel particles to expose the fuel kernel is planned. Data on the amount of carbon 14 and its treatment would be obtained to either support incineration or to recommend non-incineration options.

5. Studies on Reuse of Graphite Blocks. In terms of waste minimization, the reuse of the graphite blocks is a very promising option and to date has not been explored.

Studies on the FSV fuel would determine if reuse of the blocks is viable for the NPR.

Of course an HTGR reprocessing facility could also be efficiently used to develop the technology necessary for safe dispositioning of the quantities of other special nuclear fuel that are stored at the ICPP and other DOE sites.

You also asked the storage capacity of the IFSF. The IFSF contains 636 storage positions. If filled as designed, the IFSF will use 621 storage positions (with 15 operational reserve positions) to store 300 metric tons of FSV fuel and 13.7 metric tons of Peach Bottom fuel, for a total of 313.7 metric tons.

I hope this information is useful to you. I look forward to our continuing discussions. If you have any questions, please do not hesitate to call me or Brett Bowhan of my staff.

Sincerely,

/s/ I. Resendez
I. Resendez, Chief Counsel
Office of Chief Counsel

Enclosure

APPENDIX D

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1 2

2. AMENDMENT, MODIFICATION NO.
M001

3. EFFECTIVE DATE

4. REQUISITION/PURCHASE REQ. NO.
07-88ID01370___

5. PROJECT NO. *(If applicable)*

6. ISSUED BY CODE ___
U.S. Department of Energy
Idaho Operations Office
785 DOE Place
Idaho Falls, ID 83402

7. ADMINISTERED BY *(If other than item 6)* CODE ___
ATTN: Kent R. Hastings

8. NAME AND ADDRESS OF CONTRACTOR
(No., street, county, State and ZIP Code)

Public Service Company of Colorado
2420 W. 26th Avenue, Suite 100-D
Denver, Colorado 80211

Valley Pines Associates
P.O. Box 85608
San Diego, CA 92138

(✓) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED *(SEE ITEM 11)*

10A. MODIFICATION OF CONTRACT/ORDER NO.

X DE-SC07-79ID01370
10B. DATED *(SEE ITEM 13)*
April 1, 1980
CODE FACILITY CODE

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

___ The above numbered solicitation is amended as set forth in item 14. The hour and date specified for receipt of Offers ___ is extended, ___ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing items 8 and 15, and returning ___ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes references to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA *(If required)*

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE

CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(✔) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: *(Specify authority)* THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES *(such as changes in paying office appropriation date, etc.)* SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).

X D. OTHER *(Specify type of modification and authority)*

Mutual Agreement of parties to a supplemental agreement

E. IMPORTANT: Contractor ___ is not, X is required to sign this document and return 3 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION *(Organized by UCF section headings, including solicitation/contract subject matter where feasible.)*

Background: This contract implements sections of another contract AT (04-3)-633 which commited DOE to receive spent fuel from the FT. Saint Vrain reactor owned by the contractor. That contract anticipated operations at a rate such that eight fuel segments would have been delivered to DOE prior to the end of eight years of operation; however, only three segments were actually delivered. This modification only extends the term to allow completion of delivery of eight segments.

Modification: A. The General Atomic Company effective January 1, 1982 changed its corporate name to Valley Pines Associates. All rights and obligations of the Government and of the contractor are unaffected by this change. This modification hereby recognizes the change and the contract is amended to substitute "Valley Pines Associates" for the name "General Atomic Company" wherever it appears in the contract.

Except as provided herein, all terms and conditions of the document references in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER *(Type or print)*

15B. CONTRACTOR/OFFEROR

(Signature of person authorized to sign)

15C. DATE SIGNED

16A. NAME AND TITLE OF CONTRACTING OFFICER
(Type or print)
J.O. Lee, Chief, Procurement and Contract Operations Branch

16B. UNITED STATES OF AMERICA
BY J.O. LEE
(Signature of Contracting Officer)

16C. DATE SIGNED
5-11-88

NSN 7540-01-152-8070
PREVIOUS EDITION UNUSABLE

30-105

STANDARD FORM 30 (REV. 10-83)
PRESCRIBED BY GSA
FAR (48 CFR) 53.243

B. Article IX Term of Contract is superseded by the following:

"Article IX Term of Contract. This contract shall continue in effect until the company has delivered eight fuel segments which is currently estimated to be by December 31, 1997."

Public Service Company of Colorado

by R.O. Williams, Jr. 4/21/88
Signature Date

R.O. Williams, Jr.
Vice President
Nuclear Operations

Name and Title (Typed)

Valley Pine Associates

by Robert A. Wolf 5/4/88
Signature Date

Robert A. Wolf
Chief Administrative Officer

Name and Title (Typed)

APPENDIX E

MODIFICATION NO. MO10
SUPPLEMENTAL AGREEMENT TO
CONTRACT NO. AT (04-3)-633

This Supplemental Agreement is entered into and effective on the 1st day April, 1980, by and among the UNITED STATES OF AMERICA, acting through the DEPARTMENT OF ENERGY and hereinafter referred to as "DOE"; PUBLIC SERVICE COMPANY OF COLORADO, a corporation duly organized and existing under the laws of the State of Colorado and hereinafter referred to as "PSC"; and GENERAL ATOMIC COMPANY, a general partnership of GULF OIL CORPORATION and SCALLOP NUCLEAR INC. organized under the laws of the State of California and hereinafter referred to as "GAC".

WHEREAS, GAC has tendered the FT. ST. VRAIN Nuclear Generating Station (the "Plant") constructed under this Contract to PSC for commercial operation and with DOE approval PSC has accepted the Plant for said commercial operation as of January 1, 1979; and

WHEREAS, the first nuclear fuel elements discharged from the Plant are ready for shipment to and acceptance by DOE for storage, settlement of the cost of reprocessing and for purchase of the contained U-223, all in accordance with Article II, Section 3, Paragraphs f and g of Contract No. ST(04-3)-633; and

WHEREAS, the parties desire to set forth in the contract the said arrangements reached under Article II, Section 3, Paragraphs f and g;

NOW, THEREFORE, the parties agree as follows:

1. New paragraphs h through k are added to Article, II, Section 3 of Contract No. AT(04-3)-633 as follows:

"h. The parties have reached agreement regarding the physical shipment and receipt of the irradiated fuel elements discharged from the Plant in Agreement No. DE-SC07-79ID01370 administered by the Idaho Operations Office.

"i. For the first five nuclear fuel segments discharged from the Plant during the term of this contract and delivered to DOE under Agreement No. DE-SC07-79ID01370, the reasonable cost of fuel reprocessing under paragraph f above (regardless of whether or not DOE acually [sic] reprocesses the fuel) is $4.1M. For the U-233 produced and contained in said nuclear fuel segments, DOE shall pay of credit $5.4M as the purchase price under paragraph g above. No payment or credit shall be made for special nuclear material other than the U-233. Upon receipt of each such discharged irradiated fuel element, all right, title and interest therein shall vest in the Government.

The amounts stipulated in this paragraph i have been determined by the parties under the provisions of paragraphs f and g of this Section 3 and are fixed for said five segments discharged from the Plant. For these purposes, a "segment" is defined as that group of nuclear fuel elements which are to be replaced in the Plant during one refueling outage.

"j. Certain nuclear fuel elements in a segment may be undergoing post-irradiation examination at the time they would otherwise be delivered to DOE under Agreement No. DE-SC07-79ID01370. DOE shall receive such delayed fuel elements in accordance with Agreement No. DE-SC07-79ID01370 without change to the agreements reached with regard to cost, credit, or payment under paragraph i above.

"k. Neither PSC nor GAC small demand payment for the U-233 but shall leave the difference between the cost and purchase price stipulated in paragraph i above with DOE. In return, DOE shall receive three additional discharged segments from the Plant under Agreement No. DE-SC07-79ID01370. If, in the sole judgment of DOE, additional space is available in the Dry Fuel Storage Facility of the Idaho Chemical Processing Plant, DOE will accept additional spent fuel elements from the Plant without further adjustment or agreements under paragraphs f, g, and i above. The Government shall accept all right, title, interest in and to said additional segments or spent fuel elements upon delivery to the Idaho Chemical Processing Plant but shall have no obligations under paragraphs f, g, and i above with regard to such segments or elements."

2. Except as herein expressly modified, Contract No AT(04-3)-633 shall remain in full force and effect.

IN WITNESS WHEREOF, each of the parties hereto has executed this Supplemental Agreement as of the day and year first above written.

UNITED STATES OF AMERICA

By /s/ Gene Steffy
AUG 6 1980

GENERAL ATOMIC COMPANY

By /s/ Corwin L. Rickard

PUBLIC SERVICE COMPANY OF COLORADO

By /s/ J K Fuller
Vice President
Title

I, Robert A. Wolf, certify that I am the Secretary of General Atomic Company named above; that Corwin L. Rickard, who signed this Supplemental Agreement on behalf of said partnership, was then its Executive Vice President; and that this Agreement was duly signed for and on behalf of said partnership by authority of its governing body and is within the scope of its partnership powers.

Witness by hand and seal of said partnership this 9th day of May, 1980.

(Seal)

By /s/ Robert A. Wolf

I, D. D. Hock, certify that I am Secretary of Public Service Company of Colorado named above; that J. K. Fuller, who signed this Supplemental Agreement on behalf of

said corporation, was then Vice President of said corporation; and that this Agreement was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

Witness by hand and seal of said corporation this 22nd day of May, 1980.

(Corporate Seal)

By /s/ D. D. Hock

UNITED STATES
DEPARTMENT OF ENERGY
IDAHO OPERATIONS OFFICE

AGREEMENT NO. DE-SC07-79ID01370
BETWEEN THE UNITED STATES
DEPARTMENT OF ENERGY
PUBLIC SERVICE COMPANY OF COLORADO
AND
GENERAL ATOMIC COMPANY
FOR RECEIPT BY DOE
OF CERTAIN IRRADIATED REACTOR MATERIAL
IN FURTHERANCE OF CONTRACT AT(04-3)-633
DATED JULY 1, 1965 BETWEEN THE PARTIES

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APPENDIX A – DESCRIPTION OF SPECIFICATION MATERIAL AND DESIGNATION OF PROCESSING BATCH SIZE

APPENDIX B – CRITERIA FOR THE ACCEPTANCE OF CASK SHIPMENTS AT ICPP

APPENDIX C – IDAHO CHEMICAL PROCESSING PLANT FUEL RECEIPT CRITERIA

THIS AGREEMENT, entered into this 1st day of April 1980, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented herein by the UNITED STATES DEPARTMENT OF

ENERGY (hereinafter referred to as "DOE"); the GENERAL ATOMIC COMPANY (hereinafter referred to as "GA"), a partnership of Gulf Oil Corporation and Scallop Nuclear, Inc., a company of the Royal Dutch Shell group, with an office and place of business at San Diego, California, and the PUBLIC SERVICE COMPANY of Colorado (hereinafter referred to as the "Company"), a corporation duly organized and existing under the laws of the State of Colorado;

WITNESSETH THAT:

WHEREAS, the Company operates in Weld County, near Platteville, Colorado, a nuclear reactor, known as the Fort St. Vrain Nuclear Generating Station, subject to applicable rules and regulations issued by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended; and

WHEREAS, the Company, the U.S. Atomic Energy Commission (now DOE), and GA entered into a contract designated AT (04-3)-633 effective July 1, 1965, containing Articles II.3.f. and II.3.g. in which DOE has certain obligations regarding irradiated fuel elements removed from the subject nuclear reactor; and

WHEREAS, this Agreement implements in part, but does not replace nor substitute for the provisions of Contract No. AT(04-3)-633;

WHEREAS, this Agreement implements paragraph 17 of a certain settlement Agreement dated June 27, 1979, between the Company and GA, a copy of which has been delivered to DOE;

WHEREAS, this Agreement implements Modification No. 10 to Contract No. AT(04-3)-633; and

WHEREAS, this Agreement is authorized by and executed under the Department of Energy Organization Act of 1977 (Public Law 95-91) and other applicable laws;

NOW, THEREFORE, the parties hereto mutually agree as follows:

ARTICLE I – DEFINITIONS

The following terms, as used herein, shall have the following meanings:

A. "DOE": The United States Department of Energy or any duly authorized representative thereof, including the Contracting Officer except for the purpose of deciding an appeal under the article entitled "Disputes."

B. "Contracting Officer": The person executing this Agreement on behalf of the Government, including his successors and any duly authorized representative of any such person.

C. "Full Cost": The method of determining the costs which will be charged by DOE where it provides goods or services set forth in DOE's ERDA Manual Part 1701. Payment for such costs by the Company shall be due for those goods or services specifically stated as subject to full cost recovery in this Agreement.

D. "ICPP": The Government-owned Idaho Chemical Processing Plant located at DOE's Idaho National Engineering Laboratory (INEL) in southeastern Idaho.

E. "Irradiated Reactor Material": Irradiated material, including but not limited to source and/or special nuclear material, discharged from the core of the reactor and the regions of the reactor surrounding the core, after operation of the reactor. Unless the context indicates otherwise, the term "material" as used herein shall mean "irradiated reactor material."

F. "Processing Batch": The amount of specification material agreed to by the parties for delivery to DOE in accordance with the schedule adopted by the parties pursuant to Article III.

G. "Reactor": The nuclear reactor operated by the Company in Weld County, about 3-1/2 miles northwest of Platteville, Colorado, designated as the Fort St. Vrain Nuclear Generating Station.

H. "Specification Material": The irradiated reactor material described in an Appendix A to this Agreement which has been executed by the parties.

ARTICLE II - SCOPE

This Agreement provides the terms and conditions which apply to the satisfaction of certain of DOE's obligations under paragraphs 3.g. and 3.f. of Article II of Contract No. AT (04-3)-633, originally dated July 1, 1965, between the United States Atomic Energy Commission (represented herein by the Department of Energy), the Company, and General Dynamics Corporation (succeeded herein by GA), and its Modification No. 10 between said parties, including the acceptance by DOE of

physical possession of, title to and responsibility for specification material described in an Appendix A to this Agreement. Any obligations of the parties hereto contained in the subject Contract No. AT(04-3)-633, as amended, which are not satisfied by this Agreement remain in effect and are not altered by this Agreement.

ARTICLE III – DELIVERY OF SPECIFICATION MATERIAL BY THE COMPANY, PROCESSING BATCH

A. The Company shall deliver to DOE and DOE shall, except as otherwise provided in this Agreement, receive the specification material which is described in an Appendix A. Unless otherwise mutually agreed in writing, delivery of specification material shall be made by the Company f.o.b. commercial conveyance at DOE's ICPP Dry Fuel Storage Facility.

B. Not less than ninety (90) days in advance of the mutually agreed upon date on which the Company shall commence delivery of a processing batch, the parties shall agree on a processing batch size, shall describe the batch size in "Section III – Processing Batch Size" of Appendix A to this Agreement, and shall submit Appendix A less the post-irradiation data required in Section II.B. to DOE. The post-irradiation data shall be added to the Appendix A and furnished to DOE not less than forty-five (45) days in advance of the mutually agreed upon date on which the Company shall commence delivery of a processing batch.

C. The Company shall provide all information and take all actions required by Appendix C, "Idaho Chemical

Processing Plant Fuel Receipt Criteria," to this Agreement in accordance with the schedule set forth in Appendix C. Appendix C is attached to and hereby made a part of this Agreement.

D. Except as otherwise agreed by DOE, the Company shall advise DOE in writing of an estimated schedule for delivery of the processing batch, a container delivery and return schedule, and other information to be furnished by the Company relating to the shipment. The Company shall confirm to DOE in writing delivery of a portion of a processing batch in advance of such delivery, as prescribed by DOE.

ARTICLE IV - DISCLAIMER - LIMITATION OF LIABILITY

DOE shall have the right to dispose, as it sees fit, of any irradiated reactor material delivered hereunder, including but not limited to fission products and waste materials. Neither the Company nor GA shall have a claim against DOE or the Government with respect to such material nor shall DOE or the Government be obligated to compensate the Company or GA for such material, except as specifically provided for in this Agreement or other agreement of the parties pursuant to the referenced Contract No. AT(04-3)-633. Title to all such material delivered hereunder shall vest in the Government upon such delivery; provided, that title to any nonspecification material which is removed by the Company pursuant to Article V.C.(2) shall revest in the Company upon such removal.

ARTICLE V – NONSPECIFICATION MATERIAL

A. Final acceptance of the processing batch will be assumed to have been made unless DOE notifies the Company in writing of nonacceptance for failure to meet specifications within ninety (90) days of receipt of the processing batch. DOE may determine that all or part of the material delivered hereunder is nonspecification, at any time up to final acceptance of the material by DOE.

B. Subject to a limitation of Five Hundred Thousand Dollars ($500,000) for any one incident involving material delivered hereunder, the Company agrees to indemnify and hold the Government harmless from any and all damages, liabilities, and costs arising out of or in connection with the delivery to DOE of nonspecification material; *provided, however,* that the Company shall not be responsible to the Government for any damage, liability, or cost (1) if it arises out of or in connection with an incident occurring after final acceptance of the material by DOE; or (2) if such damage, liability, or cost would have occurred if such material had been specification material; or (3) if, but for the terms of this Article V B., the Company would be a "person indemnified" against "public liability" for a "nuclear incident" by virtue of an agreement executed by NRC under Section 170 of the Atomic Energy Act of 1954, as amended, as those terms are defined in said Act.

C. Subject to the provisions of paragraphs A. and B. above, material which differ from the specifications in such a manner as to significantly affect DOE's ability to handle or store the materials shall be dealt with as follows:

(1) If such determination is made prior to delivery of the material, the Company shall not deliver such material to DOE unless DOE agrees to accept it.

(2) If such determination is made after delivery of the material but prior to final acceptance, DOE shall promptly notify the Company of the determination. The Company shall thereupon promptly elect either to (a) remove the rejected material, or (b) provide DOE with instructions for its disposition. Any such removal or other disposition in accordance with (a) or (b) of the preceding sentence shall be at the sole expense of the Company, and the Company shall reimburse DOE for the full cost of storing and handling the material prior to such removal or other disposition. DOE may, however, accept such nonspecification material under such other arrangements as may be agreed to by the parties.

ARTICLE VI – CONTAINERS; DECONTAMINATION

A. All shipments of material from the Company to DOE will be made utilizing Company-furnished containers and equipment.

B. All containers and equipment must meet NRC and DOT applicable regulations as to safety, design criteria, cleanliness and freedom from contamination in effect at the time furnished, utilized or returned; and must meet the criteria set forth in Appendix B, attached hereto and made a part hereof.

DOE will promptly return non-DOE-owned containers and other equipment identified as "Returnable" to

the Company, and any delays caused by DOE may result in changes in the delivery schedule as agreed by the parties. DOE will not be responsible for any loss of or damage to containers or equipment except as may result from its fault or negligence.

C. Whenever material or containers are shipped to DOE, and DOE elects to decontaminate the containers, railroad cars, trucks, or other shipping vehicles or DOE's unloading area and machinery, because the containers, or the material of the method of shipment failed to meet the acceptance criteria of Appendix B, or the health and safety standards prescribed by NRC, DOT or any other Federal or State agencies having jurisdiction over such matters, DOE shall immediately notify the Company of its intent and the specific reasons for same, prior to decontamination except for necessary emergency decontamination. The Company shall pay DOE the full cost of such decontamination.

ARTICLE VII – DOE OBLIGATIONS

A. With respect to specification material delivered hereunder, DOE will provide for the receipt and storage thereof, and shall perform such measurements and analyses, if any, as it may deem advisable subject to the provisions of Article X, and may:

(1) Chemically process and convert all or part of such material to the extent, in such manner, and at such time and place as it determines advisable; or

(2) Otherwise dispose of such materials.

B. DOE may fulfill any of its obligations, or take any action, under this Agreement either directly or through contractors.

ARTICLE VIII – CHARGES FOR DOE SERVICES

The Company shall pay to DOE the total amount of the following charges:

(1) For any shipment made by rail or motor freight which requires handling and unloading outside of the regular workday of the ICPP the full cost, not to exceed $1500 per cask, for handling and unloading such shipment shall be charged. The term "regular workday," as used herein, means any day from Monday through Friday, exclusive of holidays observed at the ICPP, during the period between 8:00 a.m. and 4:30 p.m., Mountain Standard Time or Mountain Daylight Time, whichever is in effect at the ICPP. Any such handling and unloading outside of the regular workday will only be provided if approved by DOE prior to the furnishing of such services.

(2) The full cost of any decontamination special handling services or other services as set forth elsewhere in this Agreement.

ARTICLE IX – TERM OF CONTRACT

This Agreement shall apply to specification material delivered during the period in which DOE is obligated under Article II, paragraph 3.f. of Contract No. AT(04-3)-633 and Modification No. 10 between the parties hereto.

ARTICLE X – MEASUREMENTS OF MATERIAL QUANTITIES AND PROPERTIES

A. The quantity and quality of irradiated reactor material delivered hereunder shall be measured by using reactor calculations. Measurements to be made in respect to any particular material shall include determinations as to weight, size, chemical composition, and isotopic composition. The Company shall provide DOE with pertinent information and data to support the use of reactor calculations for determining source or special nuclear material (SSNM) quantities. These data and information shall include, but not be limited to: (1) the unirradiated fissionable content of each FHU including uncertainty information applicable thereto; and (2) the calculated burnup for each FHU (or batch quantity) including the principal supporting data for these calculations, and the uncertainty information for this calculation.

B. For the initial fuel discharges and for subsequent checks as desired by DOE, DOE may examine the Company's fuel fabrication data and the reactor exposure data, including the primary measurements on which they are based (temperature differential, coolant flow, etc.)

C. The information and data provided above will be reviewed and evaluated by both parties and an attempt made to reach agreement on the SSNM content. Should the parties fail to agree, the matter shall be subject to the dispute procedure of Article XIV.

ARTICLE XI – NOTICES

All notices and communications between the parties under this Agreement shall be in writing and shall be sent to the following addressees:

To DOE:
Manager
United States Department of Energy
Idaho Operations Office
550 Second Street
Idaho Falls, Idaho 83401

To the Company:
Nuclear Project Manager
Public Service Company of Colorado
P. O. Box 840
Denver, Colorado 80201

Manager, Nuclear Production
Public Service Company of Colorado
16805 Weld County Road 19 1/2
Platteville, Colorado 80651

To GA:
Manager
Contracts and Government Programs
Department
P.O. Box 81608
San Diego, California 92138

Any party may, by notice given as aforesaid, change its address for notice and communications to be given thereafter.

ARTICLE XII – RIGHT TO USE AND PUBLISH INFORMATION

DOE shall have the right to publish and use any information or data developed by DOE as the result of any service, analysis, or test performed under this Agreement for the Company.

ARTICLE XIII – RELATIONSHIP OF THIS AGREEMENT TO OTHER AGREEMENTS

Except as specifically provided herein, nothing in this Agreement shall be deemed to supersede, alter, or modify the rights and obligations of the parties under prior agreements.

ARTICLE XIV – DISPUTES

A. This Agreement is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601, et seq.). If a dispute arises relating to the Agreement, the Company may submit a claim to the Contracting Officer who shall issue a written decision on the dispute in the manner specified in DAR 1-314 (FPR 1-1.318).

B. "Claim" means:

(1) a written request submitted to the Contracting Officer;

(2) for payment of money, adjustment of Agreement terms, or other relief;

(3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) for which a Contracting Officer's decision is demanded.

C. In the case of disputed requests or amendments to such requests for payment exceeding $50,000, or with any amendment causing the total request in dispute to exceed $50,000, the Company shall certify, at the time of submission as a claim as follows:

> I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the Agreement adjustment for which the Company believes the Government is liable.
>
> (Company's Name) _____
>
> (Title) _____

D. The Government shall pay the Company interest:

(1) on the amount found due on claims submitted under this article;

(2) at the rates fixed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41;

(3) from the date the Contracting Officer receives the claim, until the Government makes payment.

E. The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or action is timely commenced within the times specified by the Contract Disputes Act of 1978.

F. The Company shall proceed diligently with performance of this Agreement, pending final resolution of any request for relief, claim, appeal or action related to the Agreement, and comply with any decision of the Contracting Officer.

ARTICLE XV – OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this Agreement if made with a corporation for its general benefit.

ARTICLE XVI – COVENANT AGAINST CONTINGENT FEES

The Company and GA warrant that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Company or GA for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this Agreement without liability or in its discretion to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE XVII – ASSIGNMENT

Neither this Agreement nor any interest therein nor claim thereunder shall be assigned or transferred by the Company or GA except as expressly authorized by the Contracting Officer.

ARTICLE XVIII – EXAMINATION OF RECORDS BY COMPTROLLER GENERAL

A. The Company and GA agree that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this Agreement, unless DOE authorizes their prior disposition, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Company and GA involving transactions related to this Agreement.

ARTICLE XVIII – EXAMINATION OF RECORDS BY COMPTROLLER GENERAL

B. The Company and GA further agree to include in all their subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract, unless DOE authorizes their prior disposition. The term "subcontract" as used in this article does not include: (1)

purchase orders not exceeding $10,000, and (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

C. The periods of access and examination described in paragraphs A. and B. above, for records which relate to (1) appeals under the "Disputes" article of this Agreement, (2) litigation or the settlement of claims arising out of the performance of this Agreement, or (3) costs and expenses of this Agreement as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall continue until such appeals, litigation, claims, or exceptions have been disposed of.

D. Nothing in this Agreement shall be deemed to preclude an audit by the General Accounting Office of any transaction under this Agreement.

ARTICLE XIX – REGULATIONS AND REQUIREMENTS; PERMITS

Except as otherwise directed by the Contracting Officer, the Company shall procure all permits or licenses necessary for the Company's performance and abide by all applicable laws, regulations, and ordinances of the United States and of the State, territory, and political subdivision in which the work under this Agreement is performed.

ARTICLE XX – EQUAL OPPORTUNITY

During the performance of this Agreement, the Company and GA agree as follows (for the purpose of this Article "the Company" shall mean the Company and GA):

A. The Company will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Company will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, excluding apprenticeship. The Company agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this "Equal Opportunity" article.

B. The Company will, in all solicitations or advertisements for employees placed by or on behalf of the Company, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

C. The Company will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the Contracting Officer, advising the labor union or workers' representative of the

Company's commitments under this "Equal Opportunity" article, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

D. The Company will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and of the rules, regulations, and relevant orders of the Secretary of Labor.

E. The Company will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

F. In the event of the Company's noncompliance with the "Equal Opportunity" article of this Agreement or with any of the said rules, regulations, or orders, this Agreement may be cancelled, terminated, or suspended, in whole or in part, and the Company may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13,

1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

G. The Company will include the provisions of paragraphs A. through G. in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontractor or vendor. The Company will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance; *Provided, however,* that in the event the Company becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Company may request the United States to enter into such litigation to protect the interests of the United States.

ARTICLE XXI – FORCE MAJEURE

Neither the Government, the Company nor GA shall be liable under this Agreement for damages occasioned by failure to perform its obligations under this Agreement if such failure arises out of causes beyond the control and without the fault or negligence of the party so failing to perform.

ARTICLE XXII – PATENT INDEMNIFICATION

The Company agrees to indemnify the Government, DOE, and persons acting on behalf of DOE against liability, including costs and expenses incurred, for infringement of any Letters Patent occurring in the performance of any service, analysis, or test performed for the Company as a result of following specific instructions of the Company in connection therewith, or occurring in the utilization by the Company of any material furnished under this Agreement; provided, that insofar as such materials are used for services utilized in the performance of a Government contract, this indemnity agreement shall not apply unless such Government contract contains provisions indemnifying the Government against patent infringement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

THE UNITED STATES OF AMERICA
BY THE DEPARTMENT OF ENERGY

By /s/ _____
Idaho Operations Office
Contracting Officer

PUBLIC SERVICE COMPANY OF COLORADO

By /s/ J K Fuller
J. K. Fuller
Name (typed)

Title Vice President
550 15 Street
Denver, Colorado 80202
(Business Address)

I, D. D. Hock, certify that I am the Secretary of the corporation named as the Company herein; that J.K. Fuller, who signed this Agreement on behalf of the Company, was then Vice President of said corporation; that said Agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said corporation this 2nd day of April 1980.

/s/ D. D. Hock
Secretary

(CORPORATE SEAL)

GENERAL ATOMIC COMPANY

By /s/ C. L. Rickard
C. L. Rickard
Name (typed)

Title EXECUTIVE VICE-PRESIDENT
P.O. BOX 81608
San Diego, California 92138
(Business Address)

I, Robert A. Wolf, certify that I am the Secretary of the General Atomic Company herein; that C. L. Rickard, who signed this Agreement on behalf of the General Atomic Company, was then Executive Vice President of said partnership; that said Agreement was duly signed

for and in behalf of said partnership by authority of its governing body, and is within the scope of its partnership powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said partnership this 11th day of April 1979.

/s/ Robert A. Wolf
Secretary

(PARTNERSHIP SEAL)

APPENDIX F

CONTRACT AT (04-3)-633

between

UNITED STATES ATOMIC ENERGY COMMISSION,

PUBLIC SERVICE COMPANY OF COLORADO,

and

GENERAL DYNAMICS CORPORATION

July 1, 1965

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THIS CONTRACT, entered into as of the first day of July, 1965, by the United States of America (hereinafter

referred to as the "Government"), as represented by the UNITED STATES ATOMIC ENERGY COMMISSION (hereinafter referred to as the "Commission"), and GENERAL DYNAMICS CORPORATION (hereinafter referred to as the "Contractor"), acting through its General Atomic Division, a corporation duly organized and existing under the laws of the State of Delaware, and PUBLIC SERVICE COMPANY OF COLORADO (hereinafter referred to as "PSC"), a corporation duly organized and existing under the laws of the State of Colorado;

WITNESSETH THAT:

WHEREAS, the parties believe that the development, design, construction, and operation of a commercial sized prototype high temperature, gas-cooled reactor (HTGR) embodied in the proposed power plant, and fueled with particles of U/Th, will provide significant contributions toward the objectives of the Commission for civilian nuclear power: and

WHEREAS, this contract has been entered into pursuant to the Atomic Energy Act of 1954, as amended, Public Law 89-32, and Public Law 89-299;

NOW THEREFORE, the parties hereto mutually agree as follows:

ARTICLE I.

DEFINITIONS

1. As used in this contract, the term:

a. "Commission" means the United States Atomic Energy Commission or any duly authorized representative thereof, including

the Contracting Officer (except for the purpose of deciding an appeal under the "Disputes" Article).

b. "Contracting Officer" means the person executing this contract on behalf of the Government and includes his successors or duly authorized representatives of such persons.

c. "Plant" means the high temperature, gas-cooled nuclear power plant described in Appendix "A".

d. "PSC-GD Agreements" means the agreements between PSC and the Contractor referred to in Article V.

e. "Peach Bottom" means the Peach Bottom reactor plant under construction on the system of Philadelphia Electric Company.

f. "HTGR" means high temperature, gas-cooled reactor steam supply system employing helium coolant and graphite moderator.

2. Arbitration, where specifically provided for in this contract, shall be effected as follows:

a. There shall be five arbitrators. The three parties shall first agree upon a list of individuals knowledgeable in the utility or nuclear industry. Each of the parties shall choose one arbitrator from this list, and the remaining two arbitrators shall be chosen, one by the Board of Directors of the Edison Electric Institute, and the second by the Board of Directors of American Nuclear Society; if either or both of these organizations do not select one or both arbitrators within thirty days after being requested, the remaining one or two arbitrators shall be chosen in a

manner specifically agreed to in writing by the three parties within fifteen days thereafter. The arbitrator selected by the Edison Electric Institute shall be an expert in the field of electric utility power plant design, construction and operation, and the arbitrator selected by the American Nuclear Society shall be an expert in the field of nuclear science and engineering. Three or more favorable or unfavorable determinations of the five arbitrators (all five arbitrators having been given the opportunity to consider the issues and vote thereon), shall control and be final and binding on the parties.

b. Any arbitration to be had hereunder shall be conducted pursuant to such procedures as shall be established by majority decision of the five arbitrators, and costs of the arbitration process shall be shared equally among the parties. The decision of the arbitrators shall be rendered within 60 days after the panel of five is established and the pertinent issues are submitted to the panel, unless the parties otherwise agree in writing.

ARTICLE II
UNDERTAKINGS OF THE PARTIES

1. The Contractor shall at no expense to the Commission or PSC (except as otherwise specifically provided in this contract):

a. Perform all research and development work to enable Contractor to fabricate the fuel elements for the Plant, and enable the Plant to be designed, constructed, operated and maintained. It is understood that the

research and development work will consist of:

(i) the program identified in Appendix "B" as being the subject of Commission reimbursement under this contract;

(ii) the program identified in Appendix "K" as not being the subject of reimbursement; and

(iii) such other research and development as may be necessary to enable the Contractor to fabricate the fuel elements for the Plant and enable the Plant to be designed, constructed, operated and maintained.

The Contractor need not perform research and development work (including that identified in Appendices "B" and "K"), the results of which are otherwise available.

b. Perform all design and engineering work and services (including, without limitation, the architect-engineer work and services provided for in Appendix "C") necessary for the construction of the Plant; excepted from this undertaking are such portions of the work and services as are to be performed by PSC pursuant to Appendix "G".

c. Design the Plant to be capable of utilizing recycled U-233 in fuel for the Plant consistent with the then existing technology and the objectives of the Commission's thorium-U-233 recycle program.

d. Construct, equip and deliver the Plant: excepted from this undertaking are such

portions hereof as are to be effected by PSC pursuant to Appendix "G".

e. Fabricate and deliver the fuel elements for the Plant as provided for in Appendix "A".

f. Train the PSC operators of the Plant to the extent provided for in Appendix "F".

g. Test-operate and provide technical direction during demonstration testing of the Plant to the extent provided for in Appendix "H".

h. Deliver the Plant to PSC as provided for in Appendix "H".

i. Satisfy the undertaking provided for in paragraph 8. of Article XIV.

j. Assist PSC to obtain all necessary permits and approvals of Federal, State and local regulatory agencies, including necessary Commission licenses.

k. Satisfy all of its other undertakings under this contract (including those provided for in Appendix "I").

2. PSC shall, at its own expense (except as otherwise specifically provided in this contract):

a. Obtain a suitable site for the Plant by May 31, 1966, which appears to be satisfactory to the Commission from its licensing standpoint.

b. Apply for and use its best efforts (in addition to the efforts of the Contractor) to cause the issuance of all necessary permits and approvals of Federal, State and local regulatory agencies, including necessary Commission licenses and authorization and

approval, if necessary, by the Public Utilities Commission of the State of Colorado.

c. Perform such other activities prior to the delivery and acceptance of the Plant as are provided for in Appendix "G".

d. Accept delivery of the Plant from the Contractor in accordance with Appendix "H".

e. Pay the Contractor for the Plant and fuel as provided in the PSC-GD Agreements.

f. Operate the Plant on the PSC system as a base-load plant for the term provided for herein.

g. Furnish information and data to the Commission reasonably required by the Commission for purposes of its Cooperative Power Reactor Demonstration Program.

h. Use its best efforts to utilize recycled U-233 in fuel for the Plant, provided such utilization is technically feasible and is feasible from the standpoints of plant operation, health and safety, and economics.

i. Institute an appropriate training program, in addition to that provided for in Appendix "F," in order to provide qualified personnel to operate and maintain the Plant.

j. Satisfy all of its other undertakings under this contract.

3. The Commission shall:

a. Lease to the Contractor, during the term provided for in this contract, the special nuclear material required for the fuel elements for the Plant.

b. Waive its use charges (fuel inventory charges), during the term provided for in this contract, up to a ceiling of $6,443,000 for the special nuclear material referred to in a. above: said ceiling amount is subject to adjustment, upward or downward, so as to conform to any changes occurring in the Commission's prices or use charges (as of June 30, 1965).

c. Reimburse the Contractor for allowable costs incurred by the Contractor, during the term provided for in this contract, for:

(i) performance of the research and development program described in Appendix "B";

(ii) performance of the Titles I, II, and III, and other engineering and related work and services described in Appendix "C"; and

(iii) conducting the initial training program described in Appendix "F."

The total amount of reimbursement provided for in this subdivision (c) shall not exceed: $12,178,000 for (i); $15,700,000 for (ii); and $85,000 for (iii); provided, however, that the Contractor may use any remainder from said ceiling for (i) or (ii) for reimbursement of the Contractor's allowable costs for (i) or (ii) that may exceed the pertinent ceiling amount; provided further that neither ceiling may thereby be increased by more than 25% without the approval of the Commission; provided further that the total ceiling established for (i) and (ii) shall not exceed $27,878,000. The Contractor and the

Commission may mutually agree in writing on significant deviations from or changes in the scope of the work provided for in Appendix "B" or Appendix "K," subject to such total ceiling amount for reimbursement for (i) and (ii). With respect to Appendix "B," and with respect to Appendix "K," if the Contractor and the Commission disagree on any significant deviations from or changes proposed by the Contractor in the scope of work therein, either of said two parties may put to arbitration the issue of whether the proposed deviations or changes in dispute are reasonably required to meet the objectives of the tasks or subtasks provided for in Appendix "B," or Appendix "K," as the case may be. If the decision is favorable to the Contractor, the deviations or changes proposed by the Contractor shall be deemed to be incorporated in Appendices "B," or "K," as the case may be, for the purposes of this contract. Any disagreement between the Contractor and the Commission as to whether other research or development may be necessary to enable the Contractor to fabricate the fuel elements for the Plant or enable the Plant to be designed, constructed, operated and maintained, as provided for in paragraph 1a(iii) of this Article II, shall be resolved by arbitration.

d. Reimburse the Contractor for its allowable costs, up to a total amount of $7,900,000, incurred by the Contractor for the actual fabrication or procurement, exclusive of developmental, design or other activities, of first-of-a-kind or specialized equipment as

provided for in Appendix "E" required for and incorporated in the Plant.

e. Reimburse the Contractor for allowable costs, up to a ceiling of $5,000,000, incurred by the Contractor for the actual fabrication (including uranium losses during fabrication, scrap recovery costs, procurement of materials, packaging and analyses), exclusive of developmental, design or other activities, of the first core, including a reasonable number of spare fuel elements required for and used in the Plant.

f. Reprocess, or make settlement for the costs of reprocessing, fuel elements discharged during the term hereinafter specified at reasonable cost to the Contractor unless commercial facilities are available at reasonable cost. In either event, such reasonable cost will be determined on the basis of the equivalent, as determined by the Commission, of the Commission's actual or estimated full cost recovery, based on reasonable assumptions concerning the life and throughput of the fuel reprocessing facility. It is understood that the Commission provides no assurance that fuel reprocessing facilities, commercial or otherwise, will actually be available. The Commission will not obligate funds in this contract for this undertaking or for its undertaking in subdivision g. next following; satisfaction of the undertakings in this subdivision f. and g. next following shall be subject to the availability of appropriations to the Commission.

g. Purchase from the Contractor the U-233 produced in fuel elements discharged during

the term hereinafter specified at prices equivalent to the then established Commission prices, if any, or the prevailing market value of U-233 if there is no established Commission price at the time. Except as the Commission and the Contractor may otherwise agree, the Contractor shall sell to the Commission the U-233 produced in fuel elements discharged from the Plant during this period. The Commission disclaims any ownership of the U-233 produced in the fuel elements during the term of this contract.

4. Performance of the research, development, design and other work and services which are to be the subject of reimbursement by the Commission to the Contractor, and the stipulations regarding ceiling amounts for reimbursement, are not to be construed as a measure of or a limitation or qualification respecting the Contractor's obligations provided for in this contract.

5. Any significant changes in the Plant and fuel elements as described in Appendix "A" shall be subject to the written approval of the Commission and PSC. Any significant changes in the design and engineering work described in Appendix "C" shall be subject to the written approval of the Commission.

ARTICLE III.

PEACH BOTTOM REVIEW

1. There is presently under construction, upon the system of Philadelphia Electric Company, the Peach Bottom Reactor Plant which will provide significant engineering and operating experience which the parties hereto desire to consider and analyze prior to proceeding beyond the initial phase of performance under this contract.

APPENDIX G

(seal)

OFFICE OF THE GOVERNOR
STATE CAPITOL
BOISE 83720

CECIL D. ANDRUS
GOVERNOR

(208) 334-2100

February 13, 1991

The Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington DC 20510

The Honorable Robert Byrd
President Pro Tempore
United States Senate
Washington, DC 20510

Re: Disapproval of Delivery of Nuclear Waste to INEL

Dear Speaker Foley and Senator Byrd:

The U.S. Department of Energy (DOE) has proposed to store commercially-generated highly radioactive nuclear waste at the Idaho National Engineering Laboratory (INEL). The waste, in the form of spent fuel, is currently being stored at a nuclear power plant in Colorado owned by Public Service Company of Colorado (Public Service), a private utility. This facility is in the process of being decommissioned. The DOE has indicated it has contracted with Public Service to accept the waste, and it has identified the INEL as its proposed storage site.

Unfortunately, the DOE has failed to meet its legal obligations in several respects with regard to the storage of this material in Idaho. Moreover, I do not believe it is in the national interest, or in the interests of the people of

the state of Idaho, for this storage to occur at INEL. The DOE has completed its Environmental Assessment (EA) relative to this matter, and I have received a copy of a Finding of No Significant Impact (FONSI) issued by the DOE dated February 5, 1991. By letter dated February 6, 1991, I served notice that the state of Idaho would not accept shipments of radioactive waste from Public Service. Despite this notification, Secretary James Watkins notified me by letter dated February 7, 1991 (see attached), that the DOE plans to accept for storage spent fuel delivered by Public Service to the INEL facility over my objections.

In view of the foregoing, pursuant to section 135 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10155(d)(6)(A), I hereby serve notice of my disapproval of the provision of 300 or more metric tons of spent fuel storage capacity at the Idaho National Engineering Laboratory.

The reasons for my disapproval are as follows:

1. The DOE has failed to cooperate and consult with the state of Idaho and Indian tribes as required by NWPA with respect to all stages of planning, development, modification, expansion, and operation of such a storage site.

2. The DOE's agreement with Public Service regarding the use of INEL as a storage site fails to comply with the NWPA.

3. The DOE's INEL storage site is situated above Idaho's most important groundwater resource, the Snake River Plain Aquifer. The placement of the material there threatens

this aquifer. The storage and shipment of spent fuel across south Idaho to the INEL threatens the health and safety of Idaho citizens.

4. The DOE has undertaken to provide at least 300 metric tons of storage capacity for commercially-generated spent fuel at INEL, and therefore would use that amount of storage capacity. The NWPA expressly requires DOE to complete an Environmental Impact Statement in full compliance with the National Environmental Policy Act (NEPA) before making such capacity available. 42 U.S.C. § 10155(c)(1). DOE has not yet done so.

5. The February 1991 Environmental Assessment DOE produced on this proposal is inadequate because it does not comply with NEPA, the Council on Environmental Quality regulations, or DOE's own NEPA regulations.

I am attaching a copy of a letter I wrote to Leo Duffy on January 30, 1991, which more fully sets forth my position and my opposition to DOE's continued attempts to use the INEL as an "interim" storage site for radioactive waste.

For all of the foregoing reasons, as provided under federal law, as Governor of the state of Idaho I hereby serve notice of my disapproval.

With best regards,

Sincerely,

Cecil D. Andrus
Governor

CDA:jcd
attachments

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

No. 91-1483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF IDAHO,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Respondent,

PUBLIC SERVICE COMPANY OF COLORADO,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

INTERVENOR BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Nuclear Waste Policy Act of 1983, 42 U.S.C. §§ 10101 *et seq.*, apply to the 1965 Research and Development Contract, as amended, between Public Service Company of Colorado and the Department of Energy?

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---

INTERVENOR BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Brief is submitted in opposition to the State of Idaho's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT

This case concerns the applicability of the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101, *et seq.*, to the 1965 contract, as amended, between Public Service Company of Colorado (Public Service) and the Atomic Energy Commission as modified in 1980, which required the Atomic Energy Commission and its successor, the Department of Energy (DOE), to accept the spent nuclear fuel generated from the Public Service Company Fort

St. Vrain Nuclear Power Plant. This is but one round in a continuing effort by the Governor of Idaho to prevent the Department of Energy from fulfilling its contractual obligation to accept the Fort St. Vrain spent nuclear fuel at DOE's Idaho National Engineering Laboratory (INEL).[1]

In 1965, Public Service entered into a research and development contract with the Atomic Energy Commission, providing for the construction of an experimental High Temperature Gas-Cooled Reactor nuclear generation facility, which ultimately became the Public Service Company Fort St. Vrain (FSV) Nuclear Power Plant. Pet. App. 2. This contract was entered into pursuant to the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.*, and Section 107 of Public Law 89-32, 79 Stat. 120, 122 (1965). The FSV reactor, built pursuant to this agree-

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[1] Initially, Cecil D. Andrus, the Governor of Idaho, threatened to call out the state police to block the Public Service shipments. After he notified Public Service of his intentions, Public Service and the DOE filed suit to obtain injunctive relief to enjoin these unconstitutional acts. In response to this claim, Idaho filed a counterclaim against the DOE, claiming that the DOE violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, by accepting the fuel. (*Public Service Company of Colorado v. Cecil D. Andrus* and *United States of America v. Cecil D. Andrus and the State of Idaho*, D. Idaho, Civil Action No. 91-0035 S HLR, consolidated with Civil Action No. 91-0054 S HLR.) On May 7, 1991, the District Court declared that the Governor's actions were unconstitutional and entered an injunction permanently enjoining him from interfering with the Fort St. Vrain shipments. This decision was not appealed. Within two weeks of learning of the Ninth Circuit's decision in this case, Idaho filed a lawsuit against DOE claiming, this time, that DOE needed an air permit before it could begin receiving shipments from Public Service. *Idaho Department of Health and Welfare v. United States Department of Energy, et al.*, CV-91-0423-EJL (D. Idaho). After the district court granted a preliminary injunction against DOE, on March 23, 1992, the Ninth Circuit reversed that decision in *Idaho Department of Health and Welfare v. United States Department of Energy*, No. 91-36207 (March 23, 1992 9th Cir.), thereby clearing the way for shipments.

ment, was to be a prototype for potential use in the development of nuclear power for this country. It was the first reactor of its type to store fuel in a dry atmosphere rather than under water.

In 1975, DOE completed construction at the Idaho National Engineering Laboratory (INEL) in Idaho for a dry storage concrete building designed specifically to receive and store the irradiated spent fuel from the prototype reactor at Fort St. Vrain. This building is the Irradiated Fuel Storage Facility. Pet. App. 3.

In April 1980, the DOE and Public Service entered into two separate agreements modifying and implementing the 1965 Agreement. These agreements required Public Service to deliver, and the DOE to receive, the FSV spent nuclear fuel at the Irradiated Fuel Storage Facility in Idaho. In these agreements, the DOE agreed to accept eight segments of the FSV spent nuclear fuel (*Id.*).[2]

In 1980, 1982 and 1984 through 1986, Public Service, having complied with all Nuclear Regulatory Commission and Department of Transportation regulations concerning the safe transportation of nuclear material, made approximately 123 shipments of spent nuclear fuel from the FSV Nuclear Plant to the Irradiated Fuel Storage Facility in Idaho.[3] Idaho neither prohibited nor inter-

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[2] Idaho's characterization of the agreement between Public Service Company and the Department of Energy as expiring (Pet. 5, 20 n.10) is in error. At the time the parties executed the amendment in 1980, they were aware that the eight segments of special nuclear fuel could not be delivered until 1989 at the earliest, since the plant had a Nuclear Regulatory Commission power restriction of 70%. Therefore, the intent and commtiment of the parties were for the Department of Energy to take the eight segments regardless of the time frame. This was the conclusion of the Ninth Circuit below. Pet. App. 4, 10. Idaho does not challenge the factual predicate upon which the Ninth Circuit based its decision.

[3] Idaho presents certain allegations concerning potential health hazards which could easily be misunderstood to refer to the spent

fered with these shipments, nor did it claim that the storage of these shipments violated the Nuclear Waste Policy Act. These shipments were transported across the highways of Idaho and were received by the DOE without incident.

On August 19, 1989, Public Service determined to permanently close the FSV Nuclear Power Plant. Pursuant to the 1965 contract, as amended, and the 1980 contract, the DOE prepared its facilities for receipt of the remainder of the spent fuel. A mutually agreed to shipping date was set and in early February 1991, an official from the DOE informed Public Service that the Irradiated Fuel Storage Facility was ready to receive the shipments of the remaining spent nuclear fuel segments from Fort St. Vrain.[4]

The State of Idaho filed a Petition for Review in the Ninth Circuit Court of Appeals, claiming that the De-

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fuel from Fort St. Vrain. It states that "[t]he Idaho National Engineering Laboratory . . . rests over the Snake River Aquifer, the primary source of Idaho's drinking water, and radioactive contaminants have already been measured in the groundwater below its surface." Pet. 11. Whether this statement is true or not is irrelevant to this case since no allegation has ever been made that the Fort St. Vrain fuel which has been stored at the Irradiated Fuel Storage Facility is either leaking or is the radioactive contaminant to which Idaho refers. There has never been any allegation that the fuel which is being stored in the Irradiated Fuel Storage Facility constitutes an actual threat to the health or safety of the people of Idaho.

[4] In its Petition, Idaho refers to a decision made by the Department of Energy in February 1991 to store 300 tons of civilian spent fuel at the INEL. Pet. 4-5. This is a mischaracterization of the situation. The decisiton for DOE to store the Fort St. Vrain spent nuclear fuel was made in 1965. The decision to store the spent nuclear fuel at the Irradiated Fuel Storage Facility in Idaho was made when that facility was built in 1975. This decision to store the fuel at the Irradiated Fuel Storage Facility was not made, as is implied by Idaho, in February 1991 when DOE informed Public Service that its facilities were ready to receive the remainder of the fuel.

partment of Energy had violated the Nuclear Waste Policy Act.[5] On September 20, 1991, ten days after oral argument, the Court of Appeals issued its decision dismissing Idaho's Petition for Review on the ground that the Nuclear Waste Policy Act did not apply to the Public Service Company/Department of Energy contract which was entered into prior to the effective date of the statute. Pet. App. 1-11. Idaho filed a Petition for Rehearing and Rehearing *En Banc*. On December 13, 1991, the Panel amended its decision and denied rehearing. The rehearing *en banc* was also denied. *Id.*

The Ninth Circuit determined that the language of the Nuclear Waste Policy Act was prospective in nature and did not apply to the pre-existing agreement between Public Service Company and the Department of Energy which had been previously authorized by Congress in Public Law 89-32, 79 Stat. 120. 122. Pet. App. 7. After the Court determined that the Nuclear Waste Policy Act did not apply to the existing Public Service Company/DOE agreement, the Court further determined that it did not have pendent jurisdiction to consider Idaho's claim under the National Environmental Policy Act.[6] Pet. App. 11.

DISCUSSION

I. THE DECISION IN THIS CASE IS NOT LIKELY TO HAVE PROSPECTIVE EFFECTS.

Idaho contends that the Court of Appeals decisions should be reviewed because it involves a question of recurring importance. Pet. 8. Idaho does not assert that this decision is in conflict with a decision of another United States Court of Appeals decision on the same matter or has so far departed from the accepted and usual course

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[5] Since Public Service had an important interest in this matter concerning its spent nuclear fuel, the Ninth Circuit granted Public Service's motion to intervene.

[6] Idaho does not challenge the dismissal of its pendent National Environmental Policy Act claim here.

of judicial proceedings as to call for an exercise of this Court's power of supervision. This case is limited solely to its facts and the possibility of its recurring is not suggested by Idaho, nor is it likely.

This case involves the situation where the Department of Energy has entered into a contract pursuant to prior statutory authority to purchase and store spent nuclear fuel. The effective date of the Nuclear Waste Policy Act is January 7, 1983. Idaho has not cited, nor are we aware of, any other agreements which predate the effective date of the Nuclear Waste Policy Act which either are or may be subject to similar judicial review on this issue.

Idaho ignores this situation by focusing on a scenario in which someday the Department of Energy may agree to take possession of some utility's spent fuel. Central to Idaho's position that this issue may recur is its statement that "[a]s the concerns over how to store spent nuclear fuel in the interim mount, the Department of Energy will be under increasing pressure to resolve the problem for the private utilities." Pet. 9. The concern of Idaho, therefore, is its speculation as to what problem may confront this country in the future. If Idaho is correct, which is not at all certain, the resolution of the problem may be legislative. If the matter Idaho envisions would be brought to litigation, the issue would be whether the Nuclear Waste Policy Act applies to contracts entered into by the DOE after the Secretary's authority under 42 U.S.C. § 10156(a) expired in 1990. Supreme Court review of the retroactivity of the Nuclear Waste Policy Act would not be an aid to resolve the speculative situation which Idaho poses. Further litigation involving the retroactivity of the Nuclear Waste Policy Act to pre-Act DOE contracts is not likely.

II. EVEN IF THE DECISION ADDRESSED A MATTER OF UNIVERSAL CONCERN, THE COURT BELOW IS CLEARLY CORRECT.

The Appellate Court examined the clear language of the Nuclear Waste Policy Act and found that it was written in terms of prospective application. Pet. App. 7. There is plainly nothing in the language of the Act or its legislative history which would imply that the Act's provisions could reach back to a contract which at the time of the effective date of the Nuclear Waste Policy Act was 17 years old, nor is there any indication that the Act intended to repeal the prior congressional act which authorized the construction of the Fort St. Vrain plant.

Not only is the specific language of the statute consistent with the lack of retroactivity, but the Appellate Court's decision is consistent with the well established rule that "retroactivity is not favored in the law," and accordingly, "Congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); Accord, *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985).

This presumption of law, as well as the plain reading of the Act's provisions, show that Congress did not intend to affect the rights of those operating under existing contracts. This clearly makes sense. What Idaho seeks to do is to void only the storage portion of the research and development contract which Public Service and DOE, the parties to the contract, are willing to implement. Idaho attempts to do this after the Fort St. Vrain plant has been built and after the Irradiated Fuel Storage Facility, the facility specifically designed for the spent fuel, has been completed. Public Service has completed its part of the bargain and Idaho, at this late date, now seeks to prevent the Department of Energy from accomplishing its part. If Public Service is unable to ship the spent nuclear fuel to Idaho pursuant to the agreements made so

long ago, who would be so foolish as to enter into any long term agreement with the government? [7]

Idaho's discussion concerning the National Environmental Policy Act (Pet. 13-16) is irrelevant. Idaho has not challenged the Ninth Circuit's dismissal of its pendent National Environmental Policy Act claim, and indeed, Idaho continues to press that claim before the U.S. District Court in Idaho (Civil Action No. 91-0054 S HLR).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[7] In *Florida Power and Light v. Westinghouse Electric Corp.*, 826 F.2d 239, 246-247 (4th Cir. 1987), the Fourth Circuit observed that without the promise by the government that resolved the spent fuel issue by agreeing to reprocess or make financial arrangements, it would have been highly unlikely that any utility would have been willing to accept the financial hazard of constructing an expensive nuclear power plant.

(2)

No. 91-1483

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In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF IDAHO, PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Part B of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10151-10157, which authorized the Secretary of Energy to enter into contracts with utilities from 1983 to 1990 for the interim storage of spent nuclear fuel, applies to a research and development contract that was entered into 17 years before enactment of the NWPA.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 945 F.2d 295.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1991. A petition for rehearing was denied on December 13, 1991. The petition for a writ of certiorari was filed on March 12, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, Congress enacted the Nuclear Waste Policy Act of 1982 (NWPA), Pub. L. No. 97-425, 96 Stat. 2201, codified at 42 U.S.C. 10101 *et seq.*, primarily to establish a process for locating, evaluating, and choosing an appropriate site for the permanent disposal of high-level radioactive waste and spent nuclear fuel. The procedures for selecting such a repository, which are contained in Part A of the Act, 42 U.S.C. 10131-10145, are not at issue in this case.

This case concerns Part B of the NWPA, 42 U.S.C. 10151-10157, wherein Congress created a "limited program for Federal storage of spent fuel from civilian nuclear powerplants." S. Rep. No. 282, 97th Cong., 1st Sess. 35 (1981). The impetus for this program was the fact that many utilities were reaching the limit of their storage capacity for spent fuel at the reactor sites. H.R. Rep. No. 785, 97th Cong., 2d Sess. Pt. 1, at 40 (1982). Congress accordingly authorized the federal government to provide a limited amount of capacity for "interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors." 42 U.S.C. 10151(a)(3).

Consistent with this purpose, Section 10155(a)(1) of Part B required the Department of Energy (DOE) to "provide * * * not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel from civilian nuclear power reactors." This storage could be provided at an existing federal storage facility, at the site of a civilian nuclear plant, or in mobile storage equipment. 42 U.S.C. 10155(a)(1)(A)-(C). Storage under Part B could be provided only if DOE entered into a contract with the utility, and if the Nuclear Regulatory Commission had made certain

determinations regarding the unavailability of storage at the reactor site. 42 U.S.C. 10155(b)(1). DOE was authorized to enter into Part B contracts for the storage of spent fuel only "[d]uring the period following January 7, 1983, but not later than January 1, 1990." 42 U.S.C. 10156(a)(1).

Special environmental review requirements were established for the provision of storage capacity under Part B. Specifically, preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) would not generally be required where storage was being made available at a facility that "is already being used, or has previously been used, for such storage." 42 U.S.C. 10155(a)(1)(A)(ii). An EIS would be required only where DOE decided to provide storage under Part B for 300 or more metric tons of spent fuel at any one facility. 42 U.S.C. 10155(c)(1). Otherwise, DOE would simply prepare an environmental assessment covering several specified subjects. 42 U.S.C. 10155 (c)(2)(A). Issuance of "any environmental impact statement or environmental assessment prepared pursuant to this subsection" was to be reviewable directly in the appropriate court of appeals. 42 U.S.C. 10155(c)(3); see 42 U.S.C. 10139(a)(1)(D) and (E).

2. This case involves a contract entered into in 1965 between the Atomic Energy Commission, a predecessor of DOE, and Public Service Co. of Colorado (PSC) for construction of an experimental nuclear power generator. This contract, which predated the enactment of the NWPA by some 17 years, was entered into pursuant to the Act of June 2, 1965, Pub. L. No. 89-32, § 107, 79 Stat. 122-123. That statute authorized the Commission to enter into a "cooperative arrangement" with a utility for "participation in the research and development, design, construction, and operation

of a high-temperature gas-cooled nuclear powerplant," and to purchase Uranium-233 "produced in and discharged from the reactor." 79 Stat. 122-123. The 1965 contract accordingly obligated the Commission to purchase Uranium-233 discharged from the experimental reactor (generally known as spent fuel). Pet. App. 2.

In 1975, the Commission, in anticipation of its responsibility for purchasing the spent fuel, constructed a storage facility for the fuel at the Idaho National Engineering Laboratory (INEL). Pet. App. 3. The experimental reactor was constructed by PSC in Fort St. Vrain, Colorado, and began commercial operation in 1979. *Id.* at 2-3. In 1980, the contract between the government and PSC was modified to specify that the government was obligated to receive eight fuel segments from the reactor, and could at its option receive the ninth and last fuel segment. *Id.* at 3, 4. From 1980 to 1986, three fuel segments were transported to INEL without incident. *Id.* at 3.

At the time of the 1980 contract modification, the parties had envisioned that deliveries of all eight fuel segments would be completed by January 1987. Both DOE and PSC understood the 1980 modification to obligate DOE to accept the eight fuel segments regardless of when the segments were shipped, however, and they formally confirmed that understanding in May 1988. Pet. App. 3-4.

In August 1989, PSC decided to shut down the reactor, and informed DOE that it planned to deliver the remaining fuel segments to INEL. Pet. App. 4. DOE prepared an environmental assessment pursuant to the National Environmental Policy Act (NEPA), and concluded that the transport and storage of the remainder of the spent fuel would have no significant environmental impact. *Ibid.* Petitioner

thereupon filed a petition for review in the court below, claiming that the proposed transfer of the remainder of the spent fuel to INEL violated NEPA and Part B of the NWPA. Petitioner asserted that the court of appeals had original jurisdiction over its claims pursuant to the judicial review provision of the NWPA, 42 U.S.C. 10139.

3. The court of appeals ruled that Part B of the NWPA did not apply to storage of spent fuel under the 1965 contract between the government and PSC. The court pointed out that the various requirements of Part B were expressly limited to storage of spent fuel pursuant to the specific and limited program created by Part B itself. Pet. App. 8-9. The court noted that Congress was aware when it enacted the NWPA that the government had preexisting obligations for the storage of spent fuel. Nevertheless, "[t]he Act's restrictive language limits the requirements to the specific set of remedial storage agreements authorized by the Act itself." *Id.* at 9. The court concluded, therefore, that the limitations in Part B did not affect the storage of spent fuel in this case, because the NWPA "does not apply to federal interim storage agreements in existence before its enactment." *Ibid.*

The court of appeals also rejected petitioner's argument that the DOE had no authority to provide for interim storage independent of the NWPA, finding that the original statutory authorization for the Fort St. Vrain project had vested the government with the requisite authority. Pet. App. 9-10. In addition, the court found that the May 1988 confirmation of DOE's and PSC's understanding of the contract was not subject to the requirements of the NWPA, because it "merely clarified the parties' pre-existing obligations and did not constitute a separate contractual agreement." *Id.* at 10. Accordingly, the court dismissed the

petition for review, since the NWPA, along with its direct review provisions, did not apply. *Id.* at 2, 11.[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the issue is not likely to arise again. Accordingly, further review is not warranted.

1. The statutory text of Part B makes it clear that Congress did not intend to affect existing arrangements for the storage of spent fuel. Section 10155 (a)(5) required DOE to ensure that storage capacity would be "made available * * * when needed, as determined on the basis of the storage needs specified in contracts entered into under section 10156(a)." 42 U.S.C. 10155(a)(5). This language demonstrates that Congress was legislating with respect to future storage that would be "made available" when certain contracts were "entered into," not storage already

[1] Because of its resolution of the jurisdictional issue, the court of appeals did not address respondent's other defenses. In particular, respondent asserted below, and maintains in this Court, that (1) the petition for review in the court of appeals was time-barred by the 180-day limitations period set forth in 42 U.S.C. 10139(c), since petitioner did not challenge the decision to store spent fuel from the Fort St. Vrain reactor at INEL until long after the 180-day period had expired; (2) under *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 208 (1988), and *United States* v. *Security Indus. Bank*, 459 U.S. 70, 79 (1982), the NWPA cannot be applied retroactively to affect preexisting contractual rights arising out of the 1965 contract between the government and PSC; and (3) the NWPA's legislative history indicates that it was intended to apply only to storage of spent fuel from non-experimental commercial light-water reactors, and has no application to the unique storage problems posed by spent fuel from the Fort St. Vrain high-temperature gas-cooled experimental reactor.

taking place pursuant to existing contracts. Similarly, Section 10155(b)(1) provided that DOE "shall offer to enter into, and may enter into, contracts under section 10156(a)" under certain specified conditions. 42 U.S.C. 10155(b)(1). Contracts under Section 10156(a) could be entered into only "[d]uring the period following January 7, 1983, but not later than January 1, 1990," and had to contain certain provisions, such as that the United States "will" take title to the spent fuel, while the utility "shall" provide payment for the storage in accordance with a fee schedule to be set by the Secretary. 42 U.S.C. 10156(a). This wholly prospective language clearly rebuts petitioner's claim that Congress intended to affect pre-NWPA storage contracts.[2]

Petitioner errs in relying (Pet. 13-16), by analogy, on cases decided under NEPA. Section 102(2)(C) of NEPA applies generally to "every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). This broad language contrasts starkly with the language of the NWPA, which expressly limits the requirements of Part B to

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[2] Petitioner's contention (Pet. 20 n.10) that the contract with PSC "expired" in 1987, and had to be renewed under the provisions of the NWPA in May 1988, was properly rejected by the court of appeals. As that court found (Pet. App. 10), the intent and understanding of the 1980 contract modification was to obligate the government to accept delivery of eight spent fuel segments regardless of timing. Thus, the May 1988 confirmation of the parties' understanding did not constitute a new agreement subject to the NWPA, but merely recognized the fact that the 1965 contract, as modified in 1980, continued in effect. *Ibid.* Petitioner points to no evidence suggesting that the court of appeals' finding on this point was in error, and in any event this fact-bound question of contractual interpretation is not worthy of this Court's review.

storage provided under its provisions. See, *e.g.*, 42 U.S.C. 10155(c) and (d). No statutory language or case authority supports petitioner's attempt to remake Part B into a statute that comprehensively governs all federal storage of spent nuclear fuel.

2. Petitioner also errs in contending (Pet. 8) that the issue presented is of recurring importance. The restrictions contained in Part B of the NWPA applied only to contracts entered into under the authority of that statute. We are informed by DOE that no contracts were entered into under Part B during the seven years in which such contracts were authorized, and the authority for such contracts expired in 1990. 42 U.S.C. 10156(a). To our knowledge, no cases have arisen under Part B, and in light of the expiration of DOE's contracting authority it would appear unlikely that any such cases will arise in the future. Moreover, petitions for judicial review under the NWPA must generally be brought within 180 days of the challenged action or failure to act, 42 U.S.C. 10139(c), and thus the likelihood of future cases involving challenges under Part B to storage contracts entered into before the 1983 enactment of the NWPA is exceedingly slight.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

Supreme Court, U.S.
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No. 91-1483

In The

Supreme Court of the United States

October Term, 1991

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY MEMORANDUM FOR THE PETITIONER

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No. 91-1483

In The

Supreme Court of the United States

October Term, 1991

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY MEMORANDUM FOR THE PETITIONER

The Ninth Circuit has effectively annulled key provisions of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* ("NWPA"). At stake are the limitations imposed by Congress to any proposal by the Department of Energy to store vast amounts of spent nuclear fuels at a Federal site; namely, the duty to first prepare a detailed statement on the impacts to the environment that may arise from any such proposal and the corollary duty to obtain the consent of the affected State. 42 U.S.C. §§ 10155(c)(1) and 10155(d)(6).

In our petition, we showed that the Ninth Circuit's holding – that the Energy Department may store 300

metric tons of spent nuclear fuels at the Idaho National Engineering Laboratory without regard for the NWPA because the action is authorized under a pre-existing contract with the Public Service Company of Colorado – contravenes its own precedent that agencies of the Federal Government must comply with the requirements of intervening legislation in carrying out or completing previously authorized actions. *See, e.g., Port of Astoria, Oregon v. Hodel,* 595 F.2d 467, 477 (9th Cir. 1979); *Jicarilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275, 1282-83 (9th Cir. 1973). The relevance of that precedent, established in other circuits as well,[1] is buttressed by this Court's admonition that immunity from the requirements of intervening legislation should not be gained through forehanded contracts. *Fleming v. Rhodes,* 331 U.S. 100, 107 (1947); *see also Thorpe v. Housing Authority of City of Durham,* 393 U.S. 268, 279 (1969).

We also showed that the Ninth Circuit's departure from prevailing precedent cannot be squared with the NWPA's text and history. Together, they command that major actions involving the storage of spent nuclear fuels at any one Federal site may take place only if the Energy Department first prepares a thorough review of the impacts to the environment from that action and obtains the consent of the affected State. *See* 42 U.S.C.

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[1] *See, e.g., Monroe County Conservation Council v. Volpe,* 472 F.2d 693, 698-99 (2nd Cir. 1972); *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323, 1330-35 (4th Cir. 1972); *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission,* 449 F.2d 1109, 1129 (D.C. Cir. 1971).

§§ 10155(c)(1) and 10155(d)(6); H.R. Rep. No. 491, 97th Cong., 2d Sess. pt. 1, at 38-41 (1982).

In response, respondents seek to minimize the importance of the question presented and the waywardness of the court of appeals' decision. Their efforts fall short of the mark.

1. Respondents assert that the decision is without consequence, because "no contracts were entered into [between the Energy Department and utilities] . . . during the seven years in which such contracts were authorized" under the NWPA. Federal Respondents' Brief in Opposition, at 8 (May 1992) ("Fed. Br. in Opp."); *see also,* Intervenor's Brief in Opposition, at 6 (April 1992) ("Interv. Br. in Opp."). That is a classic *non sequitur,* for the question presented is whether the NWPA's provisions requiring environmental review and State consent apply to *all* major federal actions to store spent nuclear fuels at a Federal site, regardless of when or how authorized. Petition for Writ of Certiorari, at i (March 1992) ("Pet.").

This case is of recurring importance because the Energy Department asserts that it has authority to store civilian spent nuclear fuels at Federal sites independent of contracts entered into under the NWPA. As a recent report reveals: "DOE is contractually bound to receive additional Fort St. Vrain fuel *and other fuels.*" Dep't of Energy, *Draft Spent Fuel and Waste Management Technology Development Plan,* at 9 (April 24, 1992) (emphasis added).[2]

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[2] The Energy Department's belated acknowledgement is surprising, for it repeatedly resisted in this and other cases our

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Looking forward, nearly 72,000 metric tons of spent nuclear fuels produced by utilities will have accumulated by the end of this decade, and over 60 of the 83 facilities operated by utilities for storing those radioactive fuels will have reached capacity by 1998. Pet., at 8-9, *citing, Pacific Gas & Electric Company v. State Energy Resources Conservation,* 461 U.S. 190, 195 (1983) and *Managing the Nation's Commercial High-Level Radioactive Waste,* Appendix B. at 258 (Office of Technology Assessment OTA-0-171 March 1985). These observations take on added significance when Section 302 of the NWPA is consulted: it requires the Energy Department to "take title" to civilian-produced spent nuclear fuels on January 31, 1998 and "dispose" of those fuels in a monitored retrievable storage facility or permanent repository. 42 U.S.C. §§ 10222(a)(1) and (a)(5); *see also,* 42 U.S.C. §§ 10101, 10107, 10138, 10161, 10194, 10251, and 10269. However, it "is highly unlikely" the Department will have started building the storage facility or repository by then. General Accounting Office, *Nuclear Waste: Operations of Monitored Retrievable Storage Facility is Unlikely by 1998,* at 3 (GAO/RCED-91-194 September 1991).

(Continued from previous page)

requests to discover evidence about its obligations to store spent nuclear fuels at Federal sites. However, after observing "that there may be a great number of documents contrary to the agency's position[,]" a federal court in a related case recently ruled that the Energy Department must be more forthcoming and ordered it to produce the evidence. *Public Service Company of Colorado v. Andrus,* Civil Nos. 91-0035-S-HLR and 91-0054-S-HLR, Order on Pending Discovery and Procedural Motions, at 6 & 10 (D. Idaho May 7, 1992). The order is set out in the Supplemental Appendix to this memorandum.

In a few years, then, the Energy Department may try to use existing Federal sites to store the vast amounts of spent nuclear fuels it will own on January 31, 1998. The appellate court's decision, by nullifying the heretofore applicable conditions of the NWPA, leaves States unprotected from such action.

This Court also has not hesitated to exercise its jurisdiction "to review the exercise of the grave [judicial] power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965). While that observation is in the context of the judiciary passing upon the constitutionality of a statute, the practical effect of the decision in this case is the same. The Ninth Circuit's opinion imposes a sunset on components of the NWPA that according to the statute's text are supposed to govern the federal government's interim storage of spent nuclear fuels. This outcome is precisely the sort of exercise of judicial power that calls for this Court's review under Section 1254(1) of Title 28 to the United States Code.

2. Turning to the merits of the controversy,[3] the briefs in opposition fail to even mention the Energy Department's statutory duties to prepare a statement on

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[3] The federal respondent notes that several of its defenses were not resolved by the court of appeals. Fed. Br. in Opp., at 6 n.1. However, those defenses have nothing to do with this petition. The question presented is whether the NWPA's provisions respecting environmental review and State consent apply to the Energy Department's proposal to store vast amounts of spent nuclear fuels at the Idaho National Engineering Laboratory. If these requirements apply to that proposal, the merit (or lack thereof) of the defenses noted by the federal respondent can be taken up on remand.

the impacts to the environment and obtain the consent of the affected State before storing 300 or more metric tons of spent nuclear fuels at any one Federal site. Instead, they cite to the subsections of the statute that authorize the Energy Department to enter into contracts to store spent nuclear fuels on behalf of utilities, as if the grant of authority contained in those provisions define the reach of all other aspects of Part B of the NWPA. Fed. Br. in Opp., at 6-7; Interv. Br. in Opp., at 5.

Such a defense of the court of appeals' decision is nothing more than a diversionary tactic, for as we have explained, the requirements that the Energy Department first prepare a statement on the impacts to the environment and obtain the consent of the affected State apply *whenever* a decision is made to store 300 or more metric tons of spent nuclear fuel at any Federal site. Pet., at 12-20. Section 135(c)(1) states that "[t]he provision of 300 or more metric tons of storage capacity at any one Federal site under subsection (a)(1)(A) of this section shall be considered to be a major Federal action requiring preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332[2][C])." 42 U.S.C. § 10155(c)(1). Section 135(d)(6) sets in motion the requirements for State consent "[u]pon [the Department] deciding to provide an aggregate of 300 or more metric tons of storage capacity under subsection (a)(1) at any one site." 42 U.S.C. § 10155(d)(6). The provisions simply lack any words that limit their reach to just the interim storage of

spent nuclear fuels under contracts entered into pursuant to other subsections of the NWPA.[4]

Respondents further defend the appellate court's opinion by attacking a strawman, averring that the petition seeks to retroactively apply the NWPA. Fed. Br. in Opp., at 6-7; *see also,* Interv. Br. in Opp., at 7-8. Our position, however, is a prospective one – the statute applies to any storage of spent nuclear fuels that remains to be provided by the Energy Department. Pet. 12-20. Our position that this case involves the prospective application of the statute follows directly from the Ninth Circuit's holding in *Port of Astoria* that if major federal action remains to be performed under a pre-existing contract, the performance of those obligations are subject to the requirements of intervening statutes – in that case, section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) ("NEPA"). *Port of Astoria,* 595 F.2d at 477.

Despite the federal respondent's protestations to the contrary (Fed. Br. in Opp. at 7-8), the appellate court's departure in this case from prior precedent cannot be explained away by differences in the two statutory schemes. The broad language of section 102(2)(C) of NEPA is part and parcel of the NWPA, to wit: "[t]he provision of 300 or more metric tons of storage capacity at any one Federal site . . . shall be considered to be a major Federal action under section 102(2)(C) of the National

---

[4] Subsection (a)(1) of the NWPA, referenced in each provision, authorizes the Energy Department to provide up to 1900 metric tons of capacity for the storage of spent nuclear fuels. 42 U.S.C. § 10155(a)(1).

Environmental Policy Act." 42 U.S.C. § 10155(c)(1). This Court's review, accordingly, could dispel the confusion that arises from the court of appeals' unwillingness to provide a uniform reading to identical statutory mandates.

The departure from precedent also cannot be explained away by respondents characterizing the NWPA as limited rather than as comprehensive legislation. Fed. Br. in Opp., at 7-8. Every other federal court to consider the question has concluded that the statute sets out a "comprehensive scheme for the disposal of SNF [spent nuclear fuels] and other high-level radioactive waste generated by civilian nuclear power reactors." *See, e.g., General Electric Uranium v. Department of Energy*, 764 F.2d 896, 898 (D.C. Cir. 1985); *see also State of Tennessee v. Herrington*, 626 F. Supp. 1345, 1346 (M.D. Tenn.), *rev'd on other grounds*, 806 F.2d 642 (6th Cir. 1986).[5]

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[5] Whether the contract with Public Service Company of Colorado "expired" in 1987, and had to be renewed under the provisions of the NWPA in 1988, also is worthy of this Court's review. Pet., at 20 n.10. The Ninth Circuit's resort to parol evidence is unprecedented given it already had concluded that the original contract contained a sunset of 1987, and the parties had to enter into a new agreement the next year. Pet., at App. 3 and 4 ("all eight of the contracted fuel segments would not be delivered prior to January 1, 1987 – the term set by the original contract" and "[o]n May 11, 1988, DOE and Public Service agreed to an additional modification to the contract").

Respondents also are less than forthright in averring that we failed to present any evidence contrary to what was considered by the court of appeals. Fed. Br. in Opp., at 7, n.2. Our motion to discover evidence was denied by the court of

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3. The Ninth Circuit's decision, moreover, unwittingly sanctions a result that contravenes the NWPA's admonition that "the persons owning or operating civilian nuclear reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors" and its charge that utilities do so "by adding new onsite storage capacity in a timely manner where practical." 42 U.S.C. § 10151(a)(1). As a federal district court recently observed in a related case:

> [I]n earlier proceedings which led to this court's order of May 7, 1991, the DOE represented that the storage facility at INEL was the *only* storage facility available which could accept the spent nuclear fuel from Fort St. Vrain. The court is of the opinion that DOE may have acted in bad faith by making this representation. As the court now knows, Public Service Company (which operates the Fort St. Vrain nuclear facility) applied to the Nuclear Regulatory Commission ("NRC") in June of 1990, to build an on-site storage facility at Fort St. Vrain. The NRC authorized the construction of such a facility on February 1, 1991. Construction began immediately, and it was completed in October of 1991. In November of 1991, the NRC issued a license to Public Service Company to operate the storage facility for 20 years.

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appeals. Not surprisingly, "[t]he record does not contain any evidence contrary to the parties' expressed understanding" (Pet., at App. 10) because we were denied the opportunity to discover such evidence.

> The DOE should have been more forthcoming with the court with respect to the storage facility being constructed at Fort St. Vrain. These facts bolster Andrus's position that discovery is warranted to ensure that the full administrative record is before the court[.]

Public Service Company of Colorado, Order on Pending Discovery and Procedural Motions, at 8-9 (*See* Supplemental Appendix at 8-9). In other words, the Energy Department apparently is more concerned about hiding facts that show it does not need to store the utility's spent nuclear fuels than it is with honoring the will of Congress as expressed in the NWPA.

For the foregoing reasons, and those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

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May 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PUBLIC SERVICE COMPANY OF COLORADO, Plaintiff, v. CECIL D. ANDRUS, individually and as Governor of the State of Idaho, Defendant.	CIVIL NO. 91-0035-S-HLR (consolidated with Civil No. 91-0054-S-HLR) **ORDER ON PENDING DISCOVERY AND PROCEDURAL MOTIONS** (Filed May 7, 1992)

I. FACTS AND PROCEDURE

Now before the court are a number of discovery and procedural motions in the above-entitled matter. The background of these motions is as follows. On April 22, 1991, the defendants, Governor Cecil D. Andrus and the State of Idaho (hereinafter collectively referred to as "Andrus"), filed an Amended Answer and Counterclaim against the United States of America, specifically the United States Department of Energy (hereinafter collectively referred to as "DOE"). The counterclaim seeks declaratory and injunctive relief for alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500-706. On November 13, 1991, Andrus served his first request for production of documents on DOE. Then, on November 19, 1991, Andrus served his second request for production of documents

and his first set of interrogatories. DOE did not object to these discovery requests or respond to them in any way within the time required by Rules 33 and 34 of the Federal Rules of Civil Procedure. Rather than respond to the interrogatories and requests for production, DOE chose to file a Motion to Limit Review to the Administrative Record and for Protective Order on January 7, 1992.

DOE argues that because the counterclaim seeks judicial review of administrative decisions, the court's review should be limited to the administrative record. Therefore, DOE argues that discovery relating to the counterclaim should not be permitted, and that the court should issue a protective order barring such discovery.

Andrus did not respond directly to the motion to limit review, but instead filed a Motion to Compel Discovery on January 24, 1992. Then, on February 24, 1992, DOE filed a Motion for Stay. The court has carefully reviewed the file and determined that all of these motions are now ripe for decision.

II. ANALYSIS

A. Motion to Limit Review and for Protective Order and Motion to Compel Discovery

It is well established that the court has broad discretion in dealing with discovery matters. "Control of discovery is committed to the sound discretion of the trial court . . . . " *Mayo v. Tri-Bell Industr.*, 787 F.2d 1007, 1012 (5th Cir. 1986). "The trial court's decision to allow or deny discovery is reviewable only for abuse of discretion." *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984).

See also Dart Industr. Co. v. Westwood Chem. Co., 649 F.2d 646, 648 (9th Cir. 1980); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977).

Judicial review of agency action under NEPA is controlled by the APA. Section 706 of the APA sets forth the scope of review:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, *the court shall review the whole record or those parts of it cited by a party,* and due account shall be taken of the rule of prejudicial error.

5 U.S.C.S. § 706 (Law. Co-op. 1989) (emphasis added). Thus, the court may review the *entire* record before DOE at the time the relevant decisions were made.

When NEPA was enacted, Congress declared a broad national commitment to protect and promote environmental quality. *See* 42 U.S.C. § 4331. NEPA is a procedural statute designed to ensure that federal agencies strive to implement the policies of the Act in all major federal programs. This is accomplished through mandatory procedures which require, among other things, the preparation of a detailed environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment . . . . " 42 U.S.C.S. § 4332(2)(C) (Law. Co-op. 1989). In deciding whether the preparation of an EIS is necessary, an agency first conducts an environmental assessment ("EA"). If the EA establishes that the proposed action will have no significant impact on the environment, the agency need not prepare an EIS.

In the case at hand, DOE conducted an EA of the proposal to transport spent nuclear fuel produced at the Fort St. Vrain Nuclear Generating Station in Colorado to the Idaho National Engineering Laboratory ("INEL"), and store it at INEL's Irradiated Fuel Storage Facility. The EA determined that the action would have no significant

impact on the quality of the human environment. Andrus challenges this decision in his counterclaim.

The court does not question the general rule that judicial review of agency decisions under NEPA is limited to the administrative record. Yet, the court rejects DOE's contention that Andrus cannot conduct discovery because DOE has designated what it considers to be the record. As noted above, the court is free to review the *entire* administrative record, not simply those items which DOE would prefer the court to review.

In *Thompson v. United States Department of Labor,* 885 F.2d 551 (9th Cir. 1989), the Ninth Circuit declared: "The whole administrative record, however, 'is not necessarily those documents that the *agency* has compiled and submitted as "the" administrative record.' . . . 'The "whole" administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position.' " *Id.* at 555 (citations omitted) (emphasis in original). The Ninth Circuit has also acknowledged that discovery may be permitted in situations where the party challenging agency action charges that the administrative record is incomplete. *See Public Power Council v. Johnson,* 674 F.2d 791, 794 (9th Cir. 1982).

In addition, the court is not always limited to the administrative record. In *Animal Defense Council v. Hodel,* 840 F.2d 1432 (9th Cir. 1988), the Ninth Circuit Court of Appeals held that under certain circumstances the district court may direct its inquiry beyond the administrative record, and/or permit the party challenging the agency action to conduct discovery. *Id.* at 1436. The district court

may inquire outside the record when (1) it is necessary to explain the agency's action; (2) it appears the agency relied on materials not included in the record; (3) the record must be supplemented in order to explain technical terms or complex subject matters; and (4) when the plaintiffs make a strong showing of bad faith or improper behavior on the part of the agency. *Id.* at 1436-37.

The court has carefully reviewed the memoranda filed by the parties, as well as the cases cited on both sides. Based upon this review, the court finds that Andrus had made a strong showing that the administrative record designated by DOE is incomplete. The court is persuaded that the agency relied on, or at least considered, materials which have not been included in the record. The court is also convinced that there may be a great number of documents which are contrary to the agency's position and which were either directly or indirectly considered by DOE, but not included in the record. The court further finds that the discovery requests have been carefully designed to secure such information and documents.[1]

The court also finds Andrus's position to be particularly compelling because, in conducting its environmental assessment, DOE was required to assess whether the current proposed action would have a cumulatively significant impact on the environment when viewed in light

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[1] The court rejects DOE's conclusory claim that the discovery requests are overbroad and unduly burdensome. The court finds that DOE must comply with these requests as best as it can without exorbitant cost or effort.

of all of the other previous and proposed future shipments of nuclear waste to INEL from a variety of sources outside Idaho. *See Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976); *see also,* 40 C.F.R. §§ 1508.7 and 1508.25 (1991).

The *Kleppe* case is particularly applicable to the case at hand. In *Kleppe,* environmental organizations challenged the Department of the Interior's issuance of a series of leases for coal mining in a particular region. The Supreme Court declared:

> [W]hen several proposals for coal-related actions *that will have cumulative or synergistic environmental impact upon a region* are pending concurrently before an agency, their *environmental consequences must be considered together.* Only through *comprehensive consideration* of pending proposals can the agency evaluate different courses of action.

Kleppe v. Sierra Club, 427 U.S. at 410 (footnotes omitted) (emphasis added).

The court finds that the current proposal to ship nuclear waste from Colorado to Idaho, when viewed in light of all of the other previous and proposed future shipments from other sources, may have a cumulative impact on the environment. In addition, the law requires DOE to consider the cumulative impact of all of these shipments, not just those from the Fort St. Vrain Nuclear Generating Station in Colorado. The record designated by DOE is completely devoid of any documents or other materials relating to any of the other shipments to INEL. Therefore, the court holds that Andrus is entitled to pursue his requests to discover all of the information, documents, and materials generated by or submitted to DOE,

which were either directly or indirectly considered by DOE in its EA and in its decision that an EIS is not warranted.

The court also notes that it is quite concerned by the fact that in earlier proceedings which led to this court's order of May 7, 1991, the DOE represented that the storage facility at INEL was the *only* storage facility available which could accept the spent nuclear fuel from Fort St. Vrain. The court is of the opinion that DOE may have acted in bad faith by making this representation. As the court now knows, Public Service Company (which operates the Fort St. Vrain nuclear facility) applied to the Nuclear Regulatory Commission ("NRC") in June of 1990, to build an on-site storage facility at Fort St. Vrain. The NRC authorized the construction of such a facility on February 1, 1991. Construction began immediately, and it was completed in October of 1991. In November of 1991, the NRC issued a license to Public Service Company to operate the storage facility for 20 years.

The DOE should have been more forthcoming with the court with respect to the storage facility being constructed at Fort St. Vrain. These facts bolster Andrus's position that discovery is warranted to ensure that the full administrative record is before the court before any decision is made regarding the counterclaim.

Based on the preceding discussion, the court will grant Andrus's Motion to Compel Discovery. In addition, the court will deny DOE's Motion to Limit Review to the Administrative Record and for Protective Order to the extent that the motion attempts to limit review to the record which thus far has been specified by DOE.

B. DOE's Motion for Stay

In a related case,[2] DOE has been directed to reopen the NEPA process to consider comments from the Shoshone-Bannock Tribe. DOE intends to consider these comments, as well as comments from the State of Idaho, and will issue a revised EA in early May or June of 1992. Consequently, on February 24, 1992, DOE filed a Motion for Stay, asking the court to stay its ruling on the discovery dispute on the grounds that Andrus's counterclaim is now moot.

The court has carefully reviewed the record now before the court, including the memoranda filed by the parties and the cases cited in these memoranda. Based upon this review, the court holds that the Motion for Stay should be denied. Without indicating any opinion on the merits of the counterclaim, the court finds that Andrus's counterclaim would be *moot* only if DOE issues a revised EA which concludes that the proposed shipments from Fort St. Vrain will significantly affect the quality of the environment, and thereupon undertakes to prepare a formal EIS.

III. ORDER

Based on the foregoing, and the court being fully advised in the premises,

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[2] *Shoshone-Bannock Tribes v. DOE*, Civil No. 91-0436-E-EJL (D.Idaho, Nov. 1, 1991).

IT IS HEREBY ORDERED that the Motion to Limit Review to the Administrative Record and for Protective Order, filed January 7, 1992, should be, and is hereby, DENIED to the extent that the motion attempts to limit review to the record which thus far has been specified by DOE. The request for a protective order is also hereby DENIED.

IT IS FURTHER ORDERED that the Motion to Compel Discovery, filed January 24, 1992, should be, and is hereby, GRANTED. DOE must comply with these discovery requests within thirty (30) days of this order.

IT IS FURTHER ORDERED that the Motion for Stay, filed February 24, 1992, should be, and is hereby, DENIED.

IT IS FURTHER ORDERED that the Stipulation to Extend Time, filed March 9, 1992, should be, and is hereby, DENIED as being MOOT.

DATED this 6th day of May, 1992.

/s/ Harold L. Ryan
HAROLD L. RYAN
UNITED STATES
DISTRICT JUDGE